United Nations A/C.6/54/SR.22

General Assembly
Fifty-fourth session
Official Records

Distr.: General
20 December 1999
English
Original: French

Sixth Committee

Summary record of the 22nd meeting
Held at Headquarters, New York, on Monday, 1 November 1999, at 3 p.m.

Chairman: Mr. Kawamura ..... (Japan)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82067 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Klingenberg** (Denmark), speaking on behalf of the Nordic countries, said that those countries attached great importance to the conclusion of the consideration of the draft articles on State responsibility (chap. V), which, alongside the law of treaties and the law of the peaceful settlement of disputes, constituted the last major building block of the international legal order. It had taken 48 years for the International Law Commission to adopt the draft articles in first reading, and it was to be hoped that the Commission would complete the second reading by 2001, the date on which the term of office of its current members would expire. It would then be up to Member States to bring the topic to a conclusion in the General Assembly or at a diplomatic conference. The slow pace of the drafting process was not the fault of the Commission alone, but reflected lapses in the political will of States to move from words to deeds.

2. The Nordic countries appreciated and supported the efforts of the Special Rapporteur to streamline the draft articles by merging overlapping provisions and deleting articles which appeared to be outside the scope of the draft, particularly in chapters I to III. They therefore supported the deletion of articles 20, 21 and 23 concerning obligations of conduct, result and prevention insofar as the distinction between those three categories of obligation did not have any bearing on the consequences of their breach as developed in the part two of the draft. The Nordic countries also supported the proposal that the provision on the exhaustion of local remedies (art. 26 *bis*, former art. 22) should be formulated as a savings clause, since that rule operated as a prerequisite to an international claim in certain cases.

3. The Nordic countries had no comments to make about chapters IV and V at the current stage of the Commission's work, but could immediately support the inclusion of a provision (art. 34 *bis*) on the procedure for invoking a circumstance precluding wrongfulness as well as the addition of a provision dealing with cessation in article 35, on the consequences of invoking a circumstance precluding wrongfulness.

4. With regard to the specific issues listed in paragraph 29 of the report, the Nordic countries were not convinced that a distinction between a State or States specifically injured by an internationally wrongful act and other States which had a legal interest in the performance of the relevant obligations would serve a useful purpose given the uncertainty of the concept of "other States which have a legal interest". They considered the question of compensation to be an essential issue on which more detailed provisions were needed, particularly with regard to the assessment of pecuniary damage, including interest and loss of profits. The linkage between the taking of countermeasures and compulsory arbitration actually encouraged resort to such measures instead of limiting their use; if they were delinked, strict limitations would need to be imposed on the taking of countermeasures, including refusal by the wrongdoing State of an offer to settle the matter through a binding third party procedure, as a condition for resorting to such measures. A situation in which a plurality of States was involved in a breach of an international obligation or injured by an internationally wrongful act did not appear to necessitate a particular treatment in the draft articles, but could be covered in the commentaries.

5. The Nordic countries encouraged the Special Rapporteur and the Commission to continue their efforts to finalize the second reading of the draft articles during the next two sessions.

6. **Mr. Yamada** (Japan) said that his delegation hoped that the Commission would complete the second reading of the draft articles by 2001; his Government believed that the primary objective of the codification of international law on State responsibility, the subject of chapter V of the report, was to provide an effective legal framework for the resolution of disputes among States in that area. The work of the Commission must therefore be based on prevailing State practices rather than on abstract concepts. The Commission should not hesitate to revise the draft articles if necessary. His delegation wished to make a few comments on chapters III, IV and V.

7. The drastic rationalization of chapter III had helped make the text explicit and concise; his delegation hoped that the Commission would provide the necessary explanations, in the commentaries to the newly revised articles, for the changes it proposed. It was fortunate that the Commission had decided to postpone the decision on the question of the exhaustion of local remedies, which should be carefully studied in order to determine its placement, its function and its relation to the questions of diplomatic protection. As to draft article 19 concerning State crimes, the consideration of which had been deferred to a later stage, his delegation understood that there existed virtual consensus in the Commission not to include the concept of the criminal responsibility of the State in the draft articles. The

Commission should perhaps consider whether there should be a hierarchy of international obligations and whether any special legal consequences should be prescribed for the breach of such obligations. No useful purpose was served in categorizing international obligations unless different legal consequences were provided for breaching them. He reiterated his Government's opposition to the inclusion of the concept of State crimes in the draft articles.

8. His delegation highly appreciated the distinction made by the Commission in chapter IV of the draft between aid and assistance, direction and control, and coercion, a distinction which should be amply reflected in part II, dealing with accompanying responsibility. It also appreciated the Commission's effort to take into account precedents and current State practices and believed that it was appropriate to include article 29 *bis*, on compliance with a peremptory norm, in chapter V. With regard to the *exceptio* envisaged in the new article 30 *bis* (Non-compliance caused by prior non-compliance by another State) proposed by the Special Rapporteur, that concept could be included with either "*force majeure*" or "countermeasures", although it had a distinct legal character from either of them. In any event, that article must be clearly formulated, and the need for it must be properly assessed, when the draft articles on countermeasures were finally formulated.

9. Compensation for damage as a result of invoking circumstances precluding wrongfulness and the procedures for invoking such circumstances were not clearly stipulated; those aspects needed further review. His Government believed that in general the circumstances precluding wrongfulness must be strictly limited so that States could not take advantage of that excuse to evade their responsibilities. The Commission must take a clear stand that chapter V contained an exhaustive list of such circumstances. With regard to countermeasures, his delegation believed that a proper balance should be attained between the target State and the injured State.

10. His Government would submit comments in writing on some specific questions of State responsibility in response to the Commission's request in paragraphs 28 and 29 of its report.

11. **Mr. Winkler** (Austria) said that his Government considered State responsibility to be one of the most important topics on the International Law Commission's agenda and that it had offered extensive comments on chapter V of the draft articles prepared by the Commission. It believed that chapter V should provide firm guidelines to the States on the prevention and resolution of conflicts; assist States to behave in a way that avoided internationally wrongful acts; and take effect as soon as possible, since the work of codification should have been completed some time ago.

12. In regard to Article 29 on consent, he agreed with the Special Rapporteur that, from a doctrinal point of view, the issue could, in principle, be considered an element of the primary rule, but believed that it would be wise to retain the article in its present place. As for deleting paragraph 2 of article 29, which contained an exception based on general international law, his delegation recognized that certain peremptory norms of international law could be construed as containing an "intrinsic" consent element. Nevertheless, the inclusion of a provision containing a *jus cogens* exception to the general rule of consent was warranted.

13. In principle, he agreed with the proposed wording of the new article 29 *bis* entitled "Compliance with a peremptory norm". However, for the sake of clarity, he supported the proposal that some reference to Article 103 of the Charter of the United Nations should be made, possibly in the respective commentary.

14. He questioned the inclusion of article 30 *bis* "Non-compliance caused by prior non-compliance by another State" as a circumstance precluding wrongfulness. According to doctrine, *exceptio inadimpleti contractus* appeared to be a primary rule, although the distinction between primary and secondary rules had still not been clearly established. His delegation believed that any presumed interrelationship with secondary rules concerning countermeasures was a structural error and was not convinced that any reference to that *exceptio* was warranted, outside the framework of the Vienna Convention on the Law of Treaties.

15. In regard to article 31 on *force majeure*, he welcomed the changes proposed by the Special Rapporteur and approved by the Commission, especially the deletion of the reference to "fortuitous event" in the heading and all subjective elements of the text, as it had suggested. He believed that the current text of article 31 still contained a subjective element as it referred to an "unforeseen external event"; to avoid any misinterpretation, it would be preferable to use the word "unforeseeable". He also attached considerable importance to the mention of due diligence as a standard to be applied to the performance of the obligations of international law, which the Commission had been discussing for some time. Nevertheless, in view of the advanced stage of the draft, it would be acceptable to include a "without prejudice" clause, as in article 73 of the Vienna Convention on the Law of Treaties. The due diligence standard could then be mentioned in the commentary.

16. In the case of article 33 on the state of necessity, his delegation noted that slight but quite important discrepancies existed between the text presented by the Special Rapporteur in the report being examined and the wording of draft article 33 adopted by the Commission's Drafting Committee, (A/CN.4/L.574). One of the most subtle changes made by the Drafting Committee related to the wording of paragraph 1, subparagraph (a), in which the criterion of "essential interest" was no longer limited by the reference to the State: [unless] "the act is the only means of safeguarding an essential interest of that State against a grave and imminent peril" having been changed to [unless the act] "is the only means for the State to safeguard an essential interest against a grave and imminent peril". The change entailed major consequences as it broadened the article's scope of application. The same was true of the quite pertinent reference to "the international community as a whole" in the text adopted by the Drafting Committee [para. 1(b)], which took into account obligations *erga omnes*. The changes in wording of article 33 should be examined carefully in view of their far-reaching effects and the potential for abuse. As for the very controversial issue of humanitarian intervention, his Government entirely shared the Special Rapporteur's opinion that the question of humanitarian intervention was governed by primary rules of international law, in particular article 2, paragraph 4, of the Charter of the United Nations and, consequently, was not governed by article 33. His delegation therefore trusted that the misleading wording in the commentary to article 33 would be amended.

17. Although the Commission had addressed a number of problems, others remained, in particular that of the injured State. His delegation was not satisfied with the current text of article 40, as the wording did not appear to reflect developments in contemporary international law. New approaches to the issue who was entitled to invoke State responsibility were necessary. Furthermore, international law was increasingly governed by rules whose structure no longer corresponded to the classic Westphalian system, based on reciprocity. The obligations resulting from such rules were directed at the community of States in their entirety or were of a standard-setting nature. Responsibility for the breach of *erga omnes* rules could not be treated in the same manner as those based on reciprocity. A distinction could therefore be envisaged between those States that suffered particular damage, on the one hand, and those entitled to take legal action against the wrongdoer, on the other. His delegation was aware that such an approach required the Commission to use considerable imagination, but believed it was the most appropriate way to solve the problem. Lastly, he recalled a closely related issue that the draft articles had not reflected: the relation between States entitled to invoke responsibility with regard to one and the same breach. For example, would one State's claim for reparation absorb the rights of the other States? The omission of applicable rules was of particular concern.

18. **Mr. Wee** (Singapore), commenting on chapter IV "nationality in relation to the succession of States", welcomed the expeditiousness and clarity of the Commission's work on an issue that interested many States, as indicated by the numerous statements. He supported the Commission's decision to recommend concluding discussion of the topic and noted that it was an excellent precedent for future work. The Commission was uncertain what form the draft articles should take. A declaration of the General Assembly would appear to provide a degree of flexibility in the application of the provisions. It was unfortunate that the Commission itself had given no indication as to the form, and his delegation awaited further discussion with interest.

19. Turning to chapter VII "Jurisdictional immunities of States and their property", he emphasized the usefulness of the work done by the Working Group. In particular, it had described how the work had evolved and had suggested future approaches. It was a potentially controversial topic, in so far as some States were not prepared to accept the concepts emphasized by the Commission. It was uncertain whether the Working Group's suggestions would be sufficient to reconcile the differing points of view and the suggested provisions would have to be examined further. To that end, the suggestion of the United Kingdom and Australia on the possibility of drafting a model law on the issue was most interesting and worth serious consideration.

20. On the subject of chapter V, State responsibility, his delegation took note of the significant progress made during the fiftieth and fifty-first sessions of the Commission. It also noted that the Commission had requested the opinion of Governments on several questions raised by the draft articles. That was an excellent way of initiating a dialogue with Governments on specific issues, and his delegation would endeavour to reply. The Commission had also adopted a broader perspective on the draft articles and commentaries and had the excellent idea of deleting or simplifying certain provisions, in particular in the chapters examined during its most recent session.

21. With regard to the final form of the draft, he recalled article 1, paragraph 1, of the 1947 statute of the International Law Commission, which provided that the Commission should have for its object the promotion of the progressive development of international law and its codification. Article 15 defined progressive development as meaning the

preparation of draft "conventions on subjects which have not yet been regulated" and codification as "the more precise formulation" and systematization "of rules of international law in fields where there already has been extensive state practice". That distinction highlighted the form the Commission's drafts might eventually take, which was certainly not limited to multilateral conventions, because where State practice was extensive but also divisive such a solution was not necessarily the most appropriate means of ensuring the progressive development of the law. The Special Rapporteur had been quite right to suggest postponing discussion of that issue.

22. His delegation encouraged the Commission to continue to make a clear distinction between principles already established under international law and those that were still evolving or developing. Where State responsibility was concerned, that distinction was vital in order to avoid controversy. A clearly drafted commentary which took into account that distinction, particularly for revised or additional articles, would be a most useful guide for State practice and would be in keeping with the Commission's mandate under its statute. That approach would also ensure that the Commission's work continued to represent the most exhaustive restatement of the law on that topic and would provide a balanced and objective elaboration of the principles articulated therein.

23. **Ms. Quezada** (Chile) said she hoped that the draft articles on State responsibility (chap. V) would be adopted in the form of a convention during a special conference and was surprised that the assurances and guarantees of non-repetition were contained in the part of the text dealing with reparation for injury caused. Unlike restitution in kind, indemnification or satisfaction, which tended to cancel or attenuate the injury, assurances and guarantees of non-repetition referred rather to injury which could be caused in the future and were therefore more closely related to precautionary measures.

24. With regard to the determination of injury, it would be preferable to establish a general rule which would take into account the obligation breached, its seriousness, the interests of the international community as a whole, the effective application of international law and of justice and finally, the proportionality of any compensation to the damage caused and to the advantages which would accrue to the injured State as well as to the real economic or other capacity of the offending State. Compensation should never have the effect of depriving the population of a State of its means of subsistence, which would be excessive. Any indemnification must certainly include interest and, if necessary, loss of income, as provided for in the Commission's draft, as well as moral prejudice. The question of the origin of that indemnification must also be dealt with in all cases.

25. The inclusion in the draft of rules applicable to countermeasures could be a source of confusion or even opposition to the planned text, because in some cases such measures could be lawful and in others they could be compulsory for the State taking them, and they would not therefore be internationally wrongful. At the current stage of the Commission's discussions on that question, it appeared that countermeasures should indeed be included on condition that the draft stated clearly that countermeasures must be in accordance with international law, adopted in good faith, proportional to the seriousness of the internationally wrongful act which had motivated them, must imply acceptance that a dispute existed between the States in question, requiring them to reach a peaceful settlement in accordance with international law. They must also be considered legitimate in the meantime and must in no case affect the rights of third party States.

26. The establishment of a link between countermeasures and the settlement of disputes tended to modify the nature of the former because the obligation to settle by peaceful means disputes linked to a wrongful act took precedence over all other obligations. Moreover, the rules applicable to the settlement of disputes did not come under the heading of State responsibility because their objective was the peaceful settlement of disputes arising out of the application or interpretation of primary or substantive rules, and secondary rules or those involving attribution of responsibility. They therefore required special, more detailed provisions. Including them in the draft added nothing new and could even pose problems for the adoption of the proposed text by the Commission as well as for its eventual implementation in the form of a convention. Thus, in the area of countermeasures, the compulsory arbitration required in such cases could at times aggravate the dispute which they were intended to resolve and even create new tensions between the States. The draft must therefore indicate that arbitration depended not only on legal considerations but also on political factors, since it affected justice and international peace and security. The proposed provisions relative to the settlement of disputes were in fact intended to make international responsibility effective and could therefore be described as "tertiary rules" which contributed to the implementation of the secondary rules. It would therefore be preferable to refer in general to the obligation of States to seek a peaceful solution to disputes falling under the regime of international responsibility. Finally, the creation of a supplementary authority to rule on the validity

or non-validity of arbitration decisions would inevitably affect the weight given those decisions, thereby destabilizing international relations and making the International Court of Justice the final authority for arbitration questions, which was not an acceptable solution.

27. **Ms. Škrk** (Slovenia), turning to chapter VII of the report under consideration, on jurisdiction and immunities of States and their property, said that she had carefully studied the report of the Working Group of the International Law Commission on the question and believed that the five main issues addressed by the Working Group reflected the core issues which domestic courts had to consider in cases involving the concept of the sovereign immunity of a foreign State. In view of the proliferation of commercial activities, the adoption of universally acceptable legal standards on jurisdictional immunity was of the greatest importance. Since a growing number of States gave a restrictive interpretation to the concept of immunity, the course of action adopted by the International Law Commission in order to reach a compromise solution seemed realistic and wise. Her delegation agreed with the new definition of the State proposed by the Working Group, particularly in relation to the federal State and its constituent units. Indeed, the adoption of an imprecise definition which the constituent units of a State could invoke in order to claim jurisdictional immunity of their own would be dangerous and would not contribute to the stabilization of international commercial or other relations. The International Law Commission, having had to consider the capacity of federal units to conclude treaties, had already decided that that capacity could be exercised only by a composite State as an international legal person that was internationally responsible for treaty relations under the Vienna regime on the law of treaties. The same course of action should be followed in respect of jurisdictional immunities.

28. How to define a contract or commercial transaction of a State was the question most frequently raised in domestic courts in respect of granting or waiving the jurisdictional immunity of a foreign State. The proposal of the Working Group, which had had to choose between the two main criteria applied in that regard — nature and purpose — and was, in fact, to preserve the definition of commercial transaction from the 1991 draft, seemed reasonable. In practice, however, it might leave room for different interpretations.

29. Her delegation had no objection to the Commission's proposed redrafting of the concept of a State enterprise in relation to commercial transactions. The fact was that, in the past decade, numerous States of Central and Eastern Europe had shifted to a market-oriented economy, which had led to a reduction in the number of State companies and entities involved in international commercial relations; however, the frequency with which States, through their entities, became parties to international transactions or contracts had not diminished. It was therefore as important as ever to arrive at a definition of State organs and bodies involved in such activities.

30. The Commission's decision to leave the primary jurisdiction for contracts of employment to the state of the forum seemed wise, since it preserved the delicate balance that should exist between the protection of rights of local employees and respect for the immunity of the foreign State. Likewise, it supported the Working Group's proposed approach to prejudgment or post-judgement measures. On the other hand, the term "prejudgment measures" contained in the report of the Working Group could easily be replaced by the better known term "interim measures". It would also be useful to add a non-discrimination clause in the portion of the draft on measures of constraint against a foreign State's property.

31. Her delegation had studied with great care some recent developments in State practice mentioned in the annex of the report of the Working Group, particularly the Pinochet case and the theory that jurisdictional immunity should be waived in the case of death or personal injury resulting from acts committed by a State in violation of *jus cogens* human rights norms. Those new trends should not be ignored.

32. With regard to State responsibility, which was discussed in chapter V, Slovenia supported the approach taken by the Special Rapporteur, who believed that the draft adopted on first reading should be updated in the light of contemporary State practice; decisions and advisory opinions of the international tribunals, particularly the International Court of Justice; and the literature. It agreed with the Special Rapporteur that the Commission's work on the question of international responsibility should, above all, deal with the secondary obligation arising from the breach of an international obligation and believed that it was reasonable to consider deleting or merging certain articles for the sake of simplicity and clarity. Her delegation was not entirely satisfied with the distinction drawn between obligations of conduct and obligations of result in draft article 20. If the Commission was unable to arrive at a suitable formulation for that difference, it should take into account the general principles of law and the jurisprudence of international tribunals rather than adopt a solution that was significant for some internal legal regimes only. In Slovenia, for example, the obligation of result was rare. Moreover, an obligation of result referred to a different concept from that of respect for due process of law. Thus,

a State might not always be held internationally responsible for the result of proceedings on the legal protection of a natural or legal person; however, it could be internationally responsible for guaranteeing due process of law on behalf of its competent organs and courts, particularly in the case of an abuse of recognized rights and a denial of justice.

33. As for "completed and continuing acts", she agreed with the Special Rapporteur that it was a highly political issue. There were no legal grounds for arguing that the deprivation of property after the Second World War by nationalization or expropriation, for which no compensation had been paid should be considered acts of continuing character and treated as such under the European Convention on Human Rights. First, it gave a retroactive effect to the Convention, which was contrary to the provisions of the Convention itself and to the law of treaties in general and, second, in the 1990s, the States concerned had adopted laws concerning the restitution of confiscated property or compensation, which had become effective (*ex nunc*) from the date of the restitution or compensation, and not from the date when the deprivation of property had taken effect.

34. Turning to the implication of a State in the internationally wrongful act of another State and circumstances precluding wrongfulness, she said that her delegation agreed with the course of action pursued by the Special Rapporteur and the Commission but reserved the right to express its views on the question at a later date or when the draft was considered on second reading.

35. With regard to chapter VI on reservations to treaties, she said that her delegation firmly supported the Commission's view that the basic provisions on reservations to treaties were to be found in the Vienna regime, in other words, the Conventions of 1969, 1978 and 1986. As a recent successor State, Slovenia welcomed, in particular, the definition of reservations contained in the draft Guide to Practice which included the case of unilateral statements by States, which made a notification of their succession to a treaty, thereby ensuring full respect for the sovereign equality of States in the treaty-making process. The draft guide which the Commission had just adopted on first reading proposed numerous practical solutions and clarifications in respect of reservations to treaties and interpretative declarations in multilateral and bilateral treaties. The International Law Commission should continue to elaborate the draft Guide with a view to considering it on second reading.

36. **Mr. Dufek** (Czech Republic), referring to chapter V of the report under consideration, on State responsibility, welcomed the efforts being made by the Commission to group together provisions and articles that were related to each other and to delete those that were superfluous or added nothing new. That simplified and enhanced the organizational structure of the draft articles. He supported the Special Rapporteur's proposal to merge articles 16, 17 and 19, paragraph 1, into a single article, and combine articles 18, paragraphs 3 and 5 and 24, 25 and 26 in two separate articles. Articles 18, 24, 25 and 26 had been considered too vague by some States and too analytical by some others. The definition of "continuing wrongful acts" and "composite acts" in the draft articles might appear to be too abstract and not very helpful. Nevertheless, that type of theoretical approach was of undeniable value in practice and might play a key role in determining the responsibility of a State or the reparation it was liable for. The inevitably abstract nature of those provisions, which should be retained in the draft articles, could be offset by a commentary. On the other hand, the deletion of articles 20 and 21 was justified, because the distinction that they made between obligations of conduct and obligations of result had no bearing on the consequences of a breach and did not fall within the realm of responsibility.

37. Article 27 should be retained but its wording should be reformulated. The concept of a State's responsibility for the aid and assistance it provided to another State in the commission of an internationally wrongful act could not be accepted without taking into account the subjective element, namely, the wrongfulness of the act, which would be sufficient in that case. The new element introduced by the Special Rapporteur in his second report, namely that the responsibility of an assisting State should be confined to completed acts that would have been wrongful had they been committed by the assisting State itself, was also very satisfactory.

38. As far as article 31, which dealt with *force majeure* was concerned, he supported the proposal to delete the provisions dealing with knowledge of wrongfulness of the act committed, because they could be misleading and were contrary to the notion of general elements required for the establishment of a State's responsibility. With respect to article 32, his delegation was not in favour of extending the scope of distress to cases where honour or moral integrity were at stake, since widening the scope of application could be dangerous and open up possibilities of abuse. Distress should be invoked only when human life was at stake.

39. **Mr. Thayeb** (Indonesia), commenting on chapter V of the report under consideration, on State responsibility, noted that the Commission had made further progress on that topic. Concerning the breach of an international obligation, particularly the distinction between primary and secondary

obligations, the Commission had followed the realistic approach taken by the Special Rapporteur, which made it possible to identify the relationships among the different articles and parts of the draft.

40. As far as article 16 was concerned, the relationship between the law of State responsibility and the law of treaties had been generally acknowledged. In order to resolve the problem of a treaty obligation that was in conflict with general international law, article 62 of the Vienna Convention on Treaties (fundamental change of circumstances) could be invoked to lessen the impact of *jus cogens* in articles 53 (treaties conflicting with a peremptory norm of general international law) and 64 (emergence of a new peremptory norm of general international law) of the Convention. In any event, the Vienna Convention was concerned with treaties and, in case of inconsistencies, the effect of *jus cogens* would override the validity of a treaty as a whole. Furthermore, the suggestion for the draft articles to contain a provision containing a hierarchy of the different norms of international law, had merit.

41. His delegation was willing to consider other ideas to tackle the issue of conflicting international obligations. Concerning article 30 on countermeasures, the Commission rightly recognized that it was a controversial subject, and that the possibility of abuse required that the application of such measures should be strictly regulated.

42. As far as the topic of nationality in relation to the succession of States (chapter IV) was concerned, the draft preamble and the set of 27 draft articles established a legal framework that provided the best juridical security not only for natural persons but for States as well. The second preambular paragraph had rightly pointed out that nationality was essentially governed by internal law within the limits set by international law. It would also be important to facilitate the exchange of information between States so that the negative ramifications of a particular succession of States were identified with regard to the nationality of individuals as well as to other issues linked to nationality.

43. His delegation had followed with interest the evolution of the topic on jurisdictional immunities of States and their property (chap. VII). The doctrine in that regard was traced back to the maxim "*parem non habet imperium*". With progress in international trade, contemporary international law on the jurisdictional immunity of States appeared to be based on two widely accepted concepts. According to the first, classical theory, a sovereign State could not be made a respondent in the national courts of another State without its consent. The second concept, which was restrictive, recognized the immunity of a State for public acts (*acta de jure imperii*) but not for private acts (*acta de jure gestionis*). Hence, a text that reconciled those two divergent views needed to be formulated. Having said that, his delegation believed that sovereign States should be immune from legal proceedings for their acts, whether they were of private or public nature. That was a key principle to be taken into account in the provisions of bilateral, regional and multilateral agreements governing the jurisdictional immunities of States and their property.

44. He welcomed the suggestions of the Working Group with respect to five main issues, namely: the concept of a State for purposes of immunity; criteria for determining the commercial character of a contract or transaction; concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property. It looked forward to the Commission's conclusions on those points.

45. As far as the topic of reservations to treaties was concerned (chap. VI), his delegation was satisfied with the text of the draft guidelines with commentaries thereto adopted at the fifty-first session of the Commission. It welcomed the progress achieved, and it stood ready to assist international institutions as well as States in resolving the topic of reservations and, thus, contributing to minimizing the dangers of disputes in the future.

46. As far as the working methods of the Commission were concerned (chap. X), his delegation would support a more intensive dialogue between the Commission and the Sixth Committee. Moreover, the recommendations made by the former to the latter were useful in that they contributed to more focused deliberations of the General Assembly. Another development was the presentation of the report by the Chairman of the Commission in two or three parts, which also contributed to enhancing the clarity of discussions between the Sixth Committee and the Commission. The same held true for the direct dialogue between the Chairman of the Sixth Committee, the Chairman of the Commission and the special rapporteurs of the Commission. Lastly, he welcomed the fact that the Commission's documents were posted on its Web site, which gave delegations adequate time to study them.

47. **Mr. Varso** (Slovakia) described the approach that he thought the Commission should take in dealing with State responsibility (chapter V), a topic which comprised two major elements: breach of an international obligation and restoration of the rule of law. The Commission should establish the links between the first and second element. Having established that framework, the Commission should analyse the main or constituent elements of legal

relationships, namely the issues raised by the subject of law, issues relating to legal relationships between subjects of law, issues concerning the restoration of observance of obligations by subjects of law and the means of settling disputes arising from an international responsibility.

48. Article 16 (existence of a breach of an international obligation) addressed possible conflicting international obligations and the relationship between wrongfulness and responsibility. As far as the hierarchy to be established between the obligations arising from treaties and determined by the peremptory obligations under international law were concerned, it was not sufficient to indicate that the latter had a hierarchically higher status. It would be useful for the Commission to indicate what those peremptory norms were, if only in the commentary. The notions concerning the relationship between wrongfulness and responsibility should be considered within the framework of the common provisions covering the beginning, continuation and cessation of responsibility, in relation to article 18 and articles 24 and 25.

49. Article 18 (Requirement that the international obligation be in force for the State) had two distinct aspects: whether the breach of an obligation was linked to a given State or not and, once that link had been established, the issue of non-compliance with the obligation in question. Article 20 (Obligations of conduct and obligations of result) should be placed in a framework of material and procedural rules. Paragraphs 1 and 2 of articles 24 and 25 (Completed and continuing wrongful acts) should be dealt with in succession with regard to responsibility and the object of the obligation; paragraph 3 of article 24 should be included among the provisions having to do with the object of the responsibility. Article 26 *bis* (Exhaustion of local remedies) raised the interesting question of the beginning of the obligation in relation to the exhaustion of local remedies. On that point, his delegation agreed with the Special Rapporteur that the Commission must clearly indicate that, in certain situations, responsibility may not be invoked before the exhaustion of those local remedies.

50. The articles in chapter IV of the draft used juridical terminology drawn from domestic criminal law. His delegation believed that the State responsibility which was indirectly involved in a breach of international obligation (aid, assistance, direction, control or coercion) should be treated in the same way as State responsibility which was a direct breach of that obligation. That was the basis for its interpretation of the content of articles 27 and 28. Article 28 *bis* would be superfluous if it was clearly stated that the responsibility of the party in direct breach of international obligation was never in doubt.

51. The discussions in the Commission concerning chapter V of the text (Circumstances precluding wrongfulness) had tended to increase the number of exceptions. He feared that such an approach would have negative consequences on the sacred principle of *pacta sunt servanda*. Each exception tended to weaken that principle; the stability of the basis for international relations could be seriously compromised as a result.

52. Although he understood why article 29 (Consent) had been included in the draft, he felt that it was essential to define the criteria for its application in the article itself and in the commentary. Article 29 *bis* (Compliance with a peremptory norm) should at least specify some of the peremptory norms of international law. Self-defence, which was the subject of article 29 *ter*, certainly belonged among the circumstances exonerating from responsibility, on condition that it remained within the limits set in the Charter of the United Nations.

53. His delegation approved of the approach adopted by the Special Rapporteur concerning article 30 (Countermeasures): countermeasures must be considered to be an instrument for guaranteeing the execution of the obligation, reparation or cessation, and were linked to implementation of international responsibility. That question should therefore be dealt with within the framework of the provisions relating to the re-establishment of compliance with obligations. The idea underlying article 30 *bis* (Non-compliance caused by prior non-compliance by another State) was at the limits of juridical speculation. That provision envisaged a concatenation of obligations, a situation dealt with in article 16 and article 30. His delegation, at the current stage of discussions would support the proposal made in the report that a decision on whether that was a special case would be taken at a later stage during the study of the question of countermeasures.

54. Article 31 (*Force majeure*) also belonged among the circumstances precluding responsibility, but the concept of *force majeure* needed to be more clearly defined by making a distinction between material or actual inability to comply and circumstances making such compliance more difficult.

55. With regard to article 32 (Distress), his delegation shared the concerns expressed in the report that the text currently stressed a subjective element rather than objective criterion, which could lead to abuses. He agreed with the content of article 33 (Necessity), especially in light of the decision of the International Court of Justice in the *Gabčikovo-Nagymaros Project* case.

56. Article 34 *bis* (Procedure for invoking circumstances precluding wrongfulness) should be included in the section

dealing with measures for the settlement of disputes arising out of international responsibility. Those measures could create a kind of bridge between the state of wrongfulness and the re-establishment of lawfulness. In that context it would also be worthwhile to specify that contractual obligations questioned by one of the contracting parties remained valid until an independent body had made a decision.

57. Article 35 (Consequences of invoking a circumstance precluding wrongfulness) could be included in the part dealing with the re-establishment of a lawful state. With regard to the substance, more thought must be given to the idea that, if the previous behaviour of the State affected by the act was wrongful, there was no justification for indemnifying it, while the innocent State must be indemnified by the State which had breached its rights and harmed its interests. The question of the indemnification of the affected State should also be dealt with in that context.

58. With regard to the subject of nationality in relation to succession of States (chap. IV), his delegation found the suggested draft articles satisfactory. They reflected the fact that nationality was essentially a question of local law, which implied the principle of the need to adopt domestic legislation, although international law also had a role to play, for example, the principle of the prevention of statelessness. His delegation also agreed with the Commission's recommendation concerning the form that the draft article should take: a declaration by the General Assembly which would remind States of the general principles concerning nationality in cases of State succession and would guide their behaviour in that area.

59. His delegation wished to participate fully in drafting the text for that declaration, including the preamble, an integral part of any international document which had a real effect on its implementation and interpretation.

60. Finally, he noted the Commission's recommendation concerning the conclusion of work relating to nationality in relation to the succession of States, given that States did not seem interested in the study of the second part of the topic, on nationality of natural persons in relation to the succession of States.

61. **Mr. Sun Guoshun** (China) welcomed the changes made to the first part of the draft articles on State responsibility (chap. V). He recalled that the Commission had been very divided about how to approach article 20 (Obligations of conduct), article 21 (Obligations of result) and article 23 (Obligations of prevention). Some members had believed that those three articles were unnecessary categories and should simply be deleted. The others had felt on the contrary that they were worthwhile because they would help tribunals determine whether there had been a breach of an international obligation and would serve to affirm the regime of State responsibility.

62. His delegation believed that the distinction between the three types of obligation should be retained in some form or another. The distinction between the obligation of conduct and the obligation of result had become a commonly accepted aspect of legal terminology. The Commission should therefore be very cautious in considering the complete deletion of articles 20 and 21. The obligation of prevention could be dealt with in the framework of the obligation of result. He nevertheless supported the simplified version of article 20 proposed by the Special Rapporteur and, in a spirit of compromise, would be ready to simply have that distinction mentioned in article 16, on condition that there be a detailed explanation in the commentary.

63. With regard to article 22 (Exhaustion of local remedies), he believed that rule was already firmly established both in treaty law and in customary law. That provision was an essential component of the law of State responsibility in that it specified that a State was only in breach of an international obligation when the other party could not succeed in obtaining from that State a behaviour corresponding to the international obligation in question, after exhausting all local remedies or as a result of a denial of justice. The content of that article must therefore be maintained either in the third part of the draft articles or in the first part, as was currently the case.

64. Chapter IV of the draft, dealing with the implication of a State in the internationally wrongful act of another State, included article 27 (Assistance or direction to another State to commit an internationally wrongful act) and article 28 (Responsibility of a State for coercion of another State), which in his opinion contained some ambiguities. The words "directs and controls" and "coercion" were not identical in meaning; in addition those three concepts shared some aspects of the meaning of "aids or assists". He therefore agreed with the Commission's decision to redraft the two articles in three distinct articles. The new title for chapter IV of the draft (Responsibility of a State for the acts of another State) was more appropriate than the original title. He nevertheless felt that the title should also contain the notion of wrongfulness.

65. Chapter V listed the circumstances precluding wrongfulness. With regard to necessity in particular his delegation wished to point out, as the International Court of Justice had done in the *Gabčikovo-Nagymaros Project* case, that, although necessity could justify non-compliance with a treaty, that did not mean that the treaty ceased to exist. As

soon as the state of necessity ceased, the duty to comply with the treaty revived.

66. As the Special Rapporteur had made clear, article 33 could not be used as an excuse for violating the peremptory norm of non-use of force. Given the controversy generated by the concept of humanitarian intervention there was every reason to emphasize that point, which should be explained in the commentary to the article in order to prevent any misuse.

67. **Mr. Zellweger** (Observer for Switzerland) said that his delegation was satisfied with the changes which the Commission had made in chapter III of the draft articles on State responsibility (chap. V of the report under consideration). In the drafting of legal rules terminological distinctions had meaning only to the extent that the subsumption of an act under one or another of the concepts in question had distinct legal consequences. It was nevertheless true that the theoretical differentiation between obligations of conduct and obligations of result was important even if it should not necessarily appear in the text of the draft articles.

68. With regard to the distinction between "composite acts" and "complex acts", his delegation had noted the Commission's intention to remove any reference to "complex acts". The reasoning behind that approach was understandable, but the removal of the reference might make it more difficult to understand article 25 as proposed by the Special Rapporteur.

69. The combination of paragraphs 3 to 5 of article 18 with articles 24 to 26 raised a number of questions. His delegation fully endorsed the concern to distinguish completed acts from continuing ones; however, it drew attention to the repeated use in articles 24 and 25 of the phrase "remains not in conformity with the international obligation" to state a condition of the applicability of the provisions in question. It wondered whether, apart from the question of the temporal link of a violation to specific conduct of a State, there might not also be an intertemporal problem to deal with. The phrase appeared to refer to what happened when the legal ground of the responsibility, the primary obligation, underwent a change while the conduct in question was continuing. For the sake of clarity it would be useful to draw a sharper distinction between those two problems, i.e. the question of the temporal link of a violation and the intertemporal question, which affected the legal foundation of the violation itself.

70. His delegation was glad that chapter IV of the draft articles (Implication of a State in the internationally wrongful act of another State) had been retained. Attribution within the meaning of article 3 (a) and of chapter II was indeed one of the most important issues.

71. Switzerland understood that the problem of the responsibility of a State which acted jointly with an international organization could not be solved in the draft articles under consideration. However, some thought might be given to adding, for example in chapter II, a provision to the effect that wrongful conduct could be attributable to several States in a situation in which they participated or engaged jointly in wrongful conduct. Such a reference might prevent the article's silence on that question from being interpreted in the opposite sense.

72. His delegation was satisfied with the way in which the Commission had dealt with the rule *pacta tertiis nec nocent nec prosunt* by rightly stressing the fact that a State which helped another State to commit an internationally wrongful act was responsible only when it was itself bound by the obligation in question.

73. With regard to the possible combination of article 27 (Assistance or direction to another State) with paragraph 1 of article 28 (Responsibility of a State for coercion of another State), the two cases were quite different and perhaps should not be subject to the same legal regime. The exercise of direction or control was a kind of intermediate case between aid and assistance on the one hand and coercion on the other. Switzerland fully approved the approach of avoiding any discussion of the legitimacy of the coercion exercised by a State on another State; the decisive point appeared to be that a State forced the hand of another State in order to commit by that means an internationally wrongful act. The coercing State was the true perpetrator, for it was using another State as its tool. The question therefore arose as to whether it was correct to require that the act committed by the coercing State should constitute an internationally wrongful act of that State. International wrongfulness could result just as much, if not more so, from a violation of an obligation of the coercing State. The wording proposed by the Special Rapporteur might prompt a State wishing to escape an international obligation to compel another State not bound by the same obligation to commit the violation in its stead. When there was constraint the wrongfulness resulted not only from the obligations of the coerced State but also from the obligations of the coercing State.

74. The decisive criterion for the exercise of direction or control might be the fact that the directed or controlled State was not entirely under the influence of the other State. It always enjoyed some room for manoeuvre, a fact which rendered the two States jointly responsible for their

respective conduct. Thus, for the State exercising direction or control, the wrongfulness derived from violation of an obligation which bound that State itself, regardless of the fact that the conduct of the State subject to its direction or control constituted a violation of its own obligation.

75. If that reasoning was correct, the responsibility of a State implicated in the wrongful act of another State would be engaged differently depending upon the case: in the case of aid or assistance its responsibility was engaged if the wrongfulness of the act resulted from a violation of an obligation of both States; in the case of exercise of direction or control it was engaged if the source of the wrongfulness lay in the violation of an obligation of the State exercising the direction or control; in the case of coercion it was engaged if the wrongfulness was based on the violation either of an obligation of the coercing State or of an obligation of the coerced State.

76. Turning to chapter V, entitled "Circumstances precluding wrongfulness", he said that it would be useful to revise the title, because it was not so much a question of determining whether the wrongfulness was precluded than of knowing the particular circumstances in which responsibility was not engaged. The title should therefore refer to the legal result of the application of the provisions, i.e. release from responsibility. His delegation therefore proposed to title the chapter "Circumstances eliminating responsibility".

The meeting rose at 5.20 p.m.

United Nations A/C.6/54/SR.23

General Assembly
Fifty-fourth session

Official Records

Distr.: General
22 November 1999

Original: English

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Tuesday, 2 November 1999, at 10 a.m.

Chairman: Mr. Mochochoko ..... (Lesotho)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session *(continued)*

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82079 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 155: report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Hilger** (Germany) welcomed the provisional adoption by the Drafting Committee of a set of draft articles on State responsibility (A/54/10, paras. 49-453). In Part One, chapter III of that text, the replacement of the former 11 articles by five new draft articles was to be commended, since the former chapter III had seemed somewhat overregulated. The reformulation of draft article 16, the new key provision of the chapter, was a great improvement: it covered the content of former article 17, paragraph 1, and article 19, paragraph 1, which could therefore be deleted without any loss of substance. The same was true for articles 20, 21 and 23 of the 1996 draft. His delegation also agreed with the changes to draft article 18, with its general rule on the time factor in relation to breaches of international law. The special rules for continuing and composite acts should be incorporated in draft articles 24 and 25.

2. With regard to draft article 25, the definition of composite and complex acts raised the issue of whether the Commission should adhere to a narrow concept only in the case of the former. His Government had not yet made a final decision on the matter. The decision by the International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project* would obviously have a significant impact on the discussion of composite acts.

3. With regard to chapter IV of the draft articles, he welcomed the incorporation of exact criteria for the circumstances under which a State aiding in the commission of an internationally wrongful act was internationally responsible. The savings clause — draft article 28 *bis* — ought to cover all the cases envisaged in chapter IV. The provisions of the chapter should not preclude any other basis for responsibility of a State that assisted, directed and controlled or coerced another State.

4. Chapter V had been the most difficult chapter of the draft to deal with during the Commission's latest session, since as provisionally adopted on first reading it had been extensively referred to in judicial decisions and in the literature. Further changes therefore deserved particularly careful consideration. His delegation was not convinced that draft article 29 should be deleted, even after hearing the argument that consent by another State did not preclude wrongfulness; a provision on consent should be retained in the text.

5. His delegation was also interested in two other issues relating to the preclusion of wrongfulness: *jus cogens* and self-defence. It would welcome an article recognizing the predominance of peremptory norms as well as further discussion on the question. A second paragraph in draft article 29 *ter* as proposed by the Special Rapporteur concerning self-defence and the obligations constraining States would be useful. The problem had been dealt with by the International Court of Justice in its Advisory Opinion on the Legality of the *Threat or Use of Nuclear Weapons*. An explicit paragraph would be preferable to a mere elaboration in the commentary.

6. Draft article 31 was another important provision in chapter V. There was no general requirement in international law that a State must know that its conduct was not in conformity with an obligation. His delegation therefore agreed with the proposed deletion of the subjective requirement of knowledge of wrongfulness. The deletion of other aspects of the provision was, however, acceptable only if the commentary made it sufficiently clear that *force majeure* must be genuinely beyond the control of the State invoking it and did not apply to situations in which a State brought the *force majeure* upon itself, either directly or by negligence.

7. The provision of draft article 33 on necessity was difficult and problematic. It should be possible to invoke necessity as grounds for precluding wrongfulness only in extreme cases. The draft article should therefore be drafted in the negative. As to whether the problem of humanitarian intervention should be discussed in the framework of necessity as defined by the draft article, the Commission had probably been wise to let the matter be solved in the light of developments within the United Nations system.

8. **Mr. Sepulveda** (Mexico) expressed the hope that the progress made on the draft articles on State responsibility would lead to their adoption on second reading. Significant changes had been made to their content and structure, some of which had been necessary for the sake of clarity, while others had been introduced in the interest of the widest possible acceptance. A balance had to be struck, however, for excessive simplification could weaken the effect of the Commission's work.

9. The Special Rapporteur's second report on State responsibility (A/CN.4/498 and Add.1 and 2) contained amendments that would render the draft articles substantially different from the text approved on first reading in 1996. It was therefore not yet possible to gain an overall picture of the draft articles, nor could an opinion on individual provisions be assessed if their scope had not yet been

determined. For example, one might ask how the legitimacy of countermeasures was to be judged if the dispute settlement system in relation to State responsibility was not yet known, or whether such a system would be valid even if the draft articles did not take the form of a convention.

10. Draft article 16 was crucial and its inclusion was therefore essential. The source of the obligation — whether customary, conventional or other — was, however, irrelevant to the effects of the responsibility; it would therefore be wrong to set up a system linking the existence of responsibility with the source of the rule that had been breached, even if that source had an effect on the specific consequences of the responsibility. More importantly, even when it was not a determining factor, the magnitude of the responsibility, which affected such issues as reparation or compensation, depended on the kind of rule transgressed. The breaching of a peremptory norm, such as the prohibition of the use of force in international relations, had a far more serious effect, nature and scope than the breach of a contractual rule between two States.

11. More attention should be paid to the crucial issue of the relationship between wrongfulness and responsibility, which was relevant in establishing the link between chapters III and IV. In many cases, a State which breached an international obligation could be excluded from responsibility if there were extenuating circumstances, but the breach remained a wrongful act. The Special Rapporteur's suggestion of combining the concepts contained in article 16, article 17, paragraph 1, and article 19, paragraph 1, in a single text might resolve some of the confusion that had arisen and therefore merited serious consideration.

12. With regard to draft article 18, one of the basic requirements for the existence of international responsibility was that the obligation that had been breached should be in force in the transgressor State. As the principle of intertemporality applied equally to all international obligations, there could be no exceptions to draft article 18, paragraph 1. It was important that that principle should be clearly reflected in the draft, on the basis of the modes of interpretation recognized in the Vienna Convention on the Law of Treaties. His delegation also endorsed the Special Rapporteur's suggestion that a new article should establish the principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated.

13. With regard to the proposed text of article 20, his delegation believed that, for the time being, the distinction between obligations of conduct and obligations of result should be retained, since it helped to determine when a breach occurred and when it was completed. Its elimination would, admittedly, not substantially affect the rules on State responsibility as a whole, but the distinction was worth preserving in case it should prove useful in other chapters.

14. It had been wise to strengthen draft article 26 *bis*, a procedural provision that was actually substantive, defining the moment at which State responsibility could be invoked. Non-compliance with the provision affected the very existence of responsibility, since the exhaustion of local remedies could determine whether or not international responsibility existed by giving the State an opportunity to correct its wrongful conduct.

15. Concerning chapter IV of the draft articles, his delegation shared the Special Rapporteur's view that the nature of a State's responsibility for the acts of another State should be considered from a broad perspective which took into account the concepts of *jus cogens* and *erga omnes*. Responsibility existed only when the conduct of a State involved the breach of an international rule that required it to act in a specific way. It had long been accepted that a State could bear responsibility for the wrongful act of another State when assisting, directing or controlling the commission of an internationally wrongful act or coercing it. Such responsibility would, however, depend on the obligations under international law of the State that urged on the other State.

16. The suggestion that draft article 29, on consent, ought to be deleted should be regarded with caution. Consent given in advance of an act created a circumstance that precluded wrongfulness. That was why a system of rules should be established. A more detailed analysis was required, however. Deleting the provision would not simplify the draft articles or avoid the need to define the conditions under which consent precluded wrongfulness. The draft article should be rewritten to reflect that.

17. With regard to draft article 29 *bis*, on compliance with a peremptory norm, he said that there were very few circumstances in which the provision would apply in practice, so that its inclusion in the draft articles was questionable, and probably unnecessary.

18. The text of draft article 29 *ter* suggested by the Special Rapporteur gave rise to some doubts. Any provision relating to self-defence in the draft articles must conform with those of the Charter of the United Nations. Paragraph 2 of that article posed further difficulties by placing limitations on an inherent right.

19. It would be best to retain draft articles 30 and 30 *bis* in square brackets until the regime of countermeasures was defined in chapter III of part two. If the latter was to be retained, the causal link between prior non-compliance and subsequent non-compliance should be strengthened. Some reference should also be made to proportionality.

20. The inclusion of draft article 33 might unnecessarily complicate the draft articles. The concept of necessity should be included in the draft articles, but only under well-defined conditions and within strict limitations. The draft text was not the right place to include concepts not completely rooted in international law, such as humanitarian intervention. The provisions on the use of force set out in the Charter were peremptory norms, and necessity could not be invoked to justify their violation.

21. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he offered some comments on paragraphs 604-608 of the Commission's report (A/54/10). The differences within the Commission on how to deal with the topic had led some members to question the need to pursue the work any further, with the result that the Commission had gotten bogged down in procedural matters. The question of preventing hazardous activities, useful though it was, was not the principal part of the Commission's mandate, while discussions on liability itself had not produced enough substance for the Sixth Committee to adopt firm decisions on that aspect of the topic.

22. Under international law, States were obligated to ensure that their activities did not cause transboundary harm. Principle 22 of the Stockholm Declaration clearly stated that States should cooperate in developing international law on liability and compensation for the victims of pollution or any other environmental damage caused by activities under its jurisdiction or control in areas beyond its borders. It was thus clear that a far more complete and coherent regime of liability was required than currently existed in international law. State practice with regard to hazardous activities showed that the concept of liability for transboundary damage was becoming increasingly established. It was therefore hard to understand the Commission's reluctance to address the topic.

23. It was particularly regrettable that, despite appeals to the contrary, the Commission had decided to suspend its consideration of liability until the draft articles establishing a prevention regime were adopted on second reading. His delegation supported that decision reluctantly; it would have preferred to continue the analysis, taking into account the work of previous Special Rapporteurs. Both the need to continue considering the question of liability and the unprejudicial nature of the suspension of work should be reflected in any resolution adopted by the General Assembly on the Commission's report.

24. Although protection of the environment was a complex and broad question, the Commission's request for specific questions for study in that area (A/54/10, para. 33) had sparked his delegation's interest. The Commission should carry out a preliminary study of specific environmental issues to help States decide whether to proceed with codification and development in that area. In-depth studies might be conducted later on, *inter alia*, the "polluter pays" principle and *erga omnes* obligations with regard to the environment, based on State practice. In future sessions, the Commission might prepare concrete feasibility studies for submission to States, identifying the questions it wished to address, the approach to be taken and anticipated results.

25. With regard to the holding of split sessions (paras. 633-639), his delegation believed that the Commission would benefit from dialogue and interaction with the Sixth Committee in New York. However, it would be premature to decide to hold split sessions permanently in view of their financial implications and the practical disadvantages of travelling back and forth between New York and Geneva. Greater productivity, perhaps a revision of the Commission's programme of work, should form the basis for any decisions taken.

26. **Ms. Hallum** (New Zealand) said that the codification of State responsibility was closely related to the purposes and principles of the Charter of the United Nations. As the Commission entered the final phase of its work, it was essential to maintain the momentum that had produced a set of draft articles of broad application and appeal. She urged States to assist the Commission in completing its work on the topic by 2002.

27. Among the difficult issues that remained to be resolved was the eventual form the draft articles should take. Other more fundamental issues requiring attention were the distinction between the criminal and the delictual responsibility of States; the problem of conflicting international obligations; the desirability of categorizing obligations and breaches; a satisfactory regime for the attribution to States of responsibility for internationally wrongful acts; the boundaries and content of the chapter of the draft articles dealing with circumstances precluding wrongfulness and the extent to which articles in that chapter dealt with primary rather than secondary rules; the application of countermeasures by an injured State; and the question of dispute settlement.

28. The relationship between the various chapters of the draft articles had yet to be satisfactorily articulated. The relationship between chapters II and III was clearly set out in draft article 3. How chapters IV and V fit in was less clear, but they might be considered to fall under the second part of draft article 3 concerning breach of an international obligation. Her delegation supported the streamlining of chapter III, provided that clarity and comprehensiveness were retained; the draft articles should not be over-simplified.

29. The distinction between obligations of result, obligations of conduct and obligations of prevention was a valuable one in analytical terms. Her delegation would support any pragmatic approach to retaining the distinction in the draft articles and commentary. Draft articles 24 and 25 on completed and continuing wrongful acts should be simplified, but the distinction should be preserved, since a completed wrongful act was qualitatively different from a continuing one and might involve different consequences.

30. On preliminary consideration, chapter IV might well be extended to cover interference with contractual rights, but the regime created must be universally acceptable and must not impinge inappropriately on the realm of primary rules. Her delegation also felt that a draft article 34 *bis*, setting out a procedure for invoking a circumstance precluding wrongfulness, might be a useful addition to the draft articles.

31. **Mr. Rao** (India) said that, in order to complete the draft articles on State responsibility and ensure their adoption on second reading by the year 2001, the Commission should retain well-established principles embodied in the draft articles and make only sparing drafting and structural changes; sacrifice progressive development wherever possible; eliminate concepts on which consensus had not been achieved or which were controversial; and ensure a clear relationship between different parts of the draft articles, which had been developed at different times by different Special Rapporteurs. He called for flexibility in establishing the final form of the draft articles, which were secondary rules and could not affect the primary rules or obligations contained in international conventions or arising from customary international law. Essentially, the draft articles would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade that had been developed in recent years.

32. The international community had no satisfactory and commonly accepted forums or methods for determining wrongfulness of conduct. Furthermore, the primary rules on the non-use of force, self-defence or *jus cogens* or *erga omnes* obligations, international humanitarian law or even human rights did not lend themselves easily to universal interpretation and application. Responsibility could vary according to conditions and circumstances in different parts of the world. Differentiated responsibility was therefore essential. Since the law of State responsibility could not have greater clarity than the primary rules or be more rigorous than the primary obligations, excessive elaboration of the concept of State responsibility in the draft articles would be counter-productive.

33. It was to be hoped that a precise set of draft articles under Part One would be available with appropriate commentary the following year. The Commission should simplify the content and presentation of the draft articles and, perhaps, deal separately with the important concept of international crimes. His delegation would appreciate clarification and simplification of such concepts as "complex acts", "fortuitous events", "obligations of conduct" and "obligations of result" as opposed to "obligations of prevention". As a working hypothesis, it would be useful to maintain the distinction between obligations of conduct and obligations of result. The concept of wrongfulness should also be treated separately from circumstances precluding wrongfulness, including consent, *force majeure*, distress, state of necessity and self-defence; those factors should exonerate a State from the consequences of wrongful conduct but not from the attribution of responsibility itself. Since those concepts were often virtually indistinguishable, their presentation should be consolidated in order to avoid confusion. The concept of self-defence precluding the consequences of wrongfulness was different from the concept of self-defence described in Article 51 of the Charter of the United Nations. Moreover, the role of consent as a circumstance precluding consequences was ambiguous, particularly in cases where the breach of an international obligation was of concern to more States than the one which had been directly injured and might have given its consent.

34. His delegation was not convinced that the law of State responsibility should deal with the complicated and largely abused concept of countermeasures, which were wrongful in themselves. It reserved its position on the need to treat countermeasures as a circumstance precluding wrongfulness under chapter V in Part One. The subject should not be treated further under Part Two.

35. With respect to the questions raised in paragraph 29 of the Commission's report, he said that a distinction should be drawn between States which were directly injured and those which had only a legal interest in the performance of obligations under treaties or customary international law. Intervention by the latter category of States in any situation of wrongful conduct should be governed by limits of

appropriate *locus standi*; only the State which had actually suffered material damage should be entitled to seek compensation. His delegation wished to reserve its position on the suitability of incorporating the complicated concept of differently injured States in the draft articles. In general, payment of interest on overdue compensation should be determined only after the amount of compensation had been fixed and a sufficient grace period for its payment had been allowed.

36. **Mr. Baena Soares** (Brazil) stressed the need to achieve progress in elaborating a draft convention on jurisdictional immunities of States and their property, an urgent question which continued to be deferred. The erosion of the practice of *par in parum non habet judicium* was practically universal; still, the lack of a binding text to deal with the differing treatment of the question by different States must be addressed.

37. An international convention on jurisdictional immunities of States and their property must take into account rapidly changing realities. In Brazil, for example, the Federal Court had ruled that customary norms of absolute immunity did not apply to labour-related cases, where defendants commonly claimed immunity from jurisdiction. Controversial aspects of the draft convention should be negotiated in the open-ended Working Group of the Sixth Committee to consider outstanding substantive issues. The Working Group should focus on the five substantive issues highlighted by the Chairman of the International Law Commission and should not reopen discussion of questions on which consensus had been achieved.

38. The Working Group's suggestion to redraft paragraph 1(b) of article 2 on the concept of State for purpose of immunity was acceptable, although it would be preferable to delete the brackets. Concerning the determination of the commercial nature of a contract or transaction, his delegation believed that the nature of the act should be retained as a criterion. With regard to the question that had arisen in relation to article 10, his delegation supported the suggestion to clarify paragraph 3 by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State, as suggested by the Working Group. The question of contracts of employment merited further consideration, although his delegation accepted the Working Group's proposed exceptions to the general principle of article 11.

39. With regard to measures of constraint against State property, his delegation agreed with the distinction made by the Working Group and hoped that its debates would elicit new elements that would lead to the selection of one of the three alternatives presented (A/54/10, annex, para. 129).

40. It was to be hoped that the draft articles on State responsibility would be completed and adopted on second reading by 2001 and his delegation supported the proposals put forward by the representative of India to that end. The tremendous effort invested by the Commission in the topic must necessarily culminate in a convention that was clear and could be implemented in practice. On the key question of the definition of an injured State, his delegation supported the distinction drawn between a State or States specifically injured by an internationally wrongful act, and other States which had a legal interest in the performance of the relevant obligations. It also hoped that the question of countermeasures would be given precise treatment, and that their limits and the exceptional nature of their application would be defined.

41. **Mr. Blumenthal** (Australia) speaking on State responsibility, said that his delegation had some concerns regarding the definition of an "injured State" in the context of multilateral treaties. Article 40, paragraph 2(e)(iii), of the draft articles on that topic appeared to allow any State party to a multilateral treaty for the protection of human rights and fundamental freedoms to be considered an injured State and therefore to seek reparation. While acknowledging the special position of human rights treaties, his delegation wondered what form the reparation to other States parties might take when a State party to a human rights treaty had violated the rights of its own citizens in breach of its international obligations, and how the reparation might be assessed if no actual injury had been suffered by those other States parties. If reparation in such cases was not limited to assurances and guarantees of non-repetition, the provision might encourage States to seek the other forms of reparation listed in article 42.

42. The reference in article 40, paragraph 2(f), to treaties for the protection of the collective interests of the States parties thereto required clarification as to the kind of multilateral treaties covered and raised the same questions regarding reparations. Lastly, under article 40, paragraph 3, if an internationally wrongful act constituted an international crime, the definition of injured State embraced all States, not only those whose rights had been infringed by the criminal act. His delegation doubted whether it was sensible or even workable to allow all States to seek reparation for damage perpetrated by a State against the human beings within its jurisdiction.

43. It had long been established in international law that full reparation was required without qualification. His

delegation was unaware of any State practice, international rule or legal decision supporting the exception stated in paragraph 3 of article 42 whereby reparation need not be paid if it would result in depriving the population of a State of its own means of subsistence. That exception could be abused by States to avoid their legal obligations. Nor could his delegation agree to the exception provided in article 43, paragraph (d), on the grounds that reparation would seriously jeopardize the political independence or economic stability of the State which had committed the internationally wrongful act.

44. In article 44, paragraph 2, the words "may include interests" should be replaced by the phrase "shall include interests" so as not to give the wrongdoing State an incentive to delay payment of compensation. Obligatory payment of interest would be consistent with the views of international tribunals that had considered the matter.

45. In article 45 it would be useful to define the expression "moral damage" appearing in paragraph 1. Paragraph 2(c) referred to punitive damages, a practice not recognized in all jurisdictions. The provision of paragraph 2(d) concerning disciplinary action against officials was a domestic concern which should not be covered by the draft articles. Given cultural differences, the provision of paragraph 3 limiting the satisfaction available to demands which would not impair the dignity of a wrongdoing State was arbitrary and should be deleted.

46. The Commission's work in chapter III on countermeasures constituted a valuable summary of State practice and struck a fair and appropriate balance between the interests of the injured State and the wrongdoing State. It was his delegation's view, however, that resort to dispute settlement procedures should not necessarily preclude countermeasures.

47. With regard to articles 51 to 53, on the consequences of an international crime, his delegation had serious concerns about including the concept of international crime in the draft articles. Leaving that issue aside, if the exceptions to the obligation to provide reparation in article 43 and article 45, paragraph 3, were eliminated, article 52 would also be unnecessary and should be deleted. Article 53, subparagraph (a), which obliged a State not to recognize as lawful the situation created by the crime, did not distinguish between explicit and implicit recognition. Subparagraphs (a) and (b) were both problematic in that they contained no reference to time-frames.

48. His delegation believed that it was both desirable and feasible for the Commission to complete its work on the topic within the quinquennium and felt that the eventual form the draft articles would take should be left open for the time being.

49. **Mr. González Sánchez** (Venezuela) said that his delegation was grateful to the Commission's Working Group for re-examining the draft articles on jurisdictional immunities of States and their property in the light of recent developments of State practice and legislation. However, the case law examined did not fully reflect the jurisprudence of national courts on the matter. His delegation was carefully considering the Working Group's recommendations on the concept of the State, state enterprises, contracts of employment and measures of constraint, and would present its ideas at the forthcoming meeting of the working group of the Sixth Committee on the topic. A truly effective draft convention which was acceptable to all States would make a great contribution to the codification and development of international law.

50. In dealing with the topic of State responsibility, the Commission, in its effort to improve the draft articles, should not stray too far from its original version. Any changes should serve to streamline and clarify the text without reducing its content and scope.

51. The distinction between obligations of conduct and obligations of result set forth in draft articles 20 and 21 was far from academic and had major implications for the secondary rules that would be developed to determine State responsibility. Thus while his delegation could accept drafting changes that might streamline the provisions, it strongly supported retaining that distinction.

52. His delegation was particularly interested in the issues raised in connection with chapter IV, on implication of a State in the internationally wrongful act of another State. The inclusion of the word "assistance" in article 27 was appropriate. The point at issue was not the joint conduct of two or more States, which might appropriately be placed under chapter II, but rather the specific problem of the possible implication of one State in the wrongful act of another State, which deserved separate treatment. In the proposed article 28, on the responsibility of a State for coercion of another State, it should be clarified that the term "coercion" was not limited to the use of armed force, but extended to any contact, including economic pressure, that left the coerced State with no option but to comply with the desires of the coercing State.

53. With regard to chapter V, on circumstances precluding wrongfulness, he stressed that the wording should embody a restrictive criterion in order to prevent States from using it as an excuse for not complying with their international

obligations. His delegation agreed with the Special Rapporteur that there was a valid distinction between "fortuitous event" and "*force majeure*" and therefore supported his proposed new wording for article 31, which deleted the reference to the former and provided a better definition of the latter. The Special Rapporteur's proposal to eliminate the subjective element implied in the phrase "to know that its conduct was not in conformity with that obligation", was also a sound one.

54. With respect to article 40 and the meaning of "injured State", his delegation believed it was appropriate to refer to a right infringed by the act of a State but not necessary to refer to the damage so caused. The infringement of a right need not cause damage, still less immediate damage; the wrongful act might cause potential damage. His delegation concurred that the list contained in paragraph 2 of draft article 40 was merely indicative and left open the possibility that other situations might apply, for instance, that a State might be injured by a unilateral act of another State, a topic taken up elsewhere by the Commission.

55. Article 40, paragraph 3, concerning a State injured by an international crime, should be retained and specific rules relating to the legal consequences of such acts should be included. Similarly, if the decision was made to retain article 19, one of the most controversial articles, then articles 51 to 53 must be retained also. The distinction between delicts and crimes — or to use a more acceptable term, exceptionally serious wrongful acts — was important if specific rules were to be established to govern the legal consequences of those acts.

56. His delegation fully supported the principle underlying article 41, since the obligation to cease wrongful conduct was surely the first necessity. Mention of cessation of wrongful conduct could appear either in a separate provision, as the Commission had proposed, or in the article on the consequences of an internationally wrongful act, as suggested by France in its written commentary.

57. **Mr. Keinan** (Israel) said that one of the most controversial aspects of Part Two of the draft articles on State responsibility (A/54/10, chap. V) was the definition of an injured State. Article 40 set out a series of situations in which States could be considered to be injured, but his delegation was not convinced that the list made a useful contribution; in fact, some of the examples included in the list were actually problematic.

58. A case in point was paragraph 2(e), which addressed the situation of a State injured by a violation of a multilateral treaty: that provision appeared to attempt to usurp the role of the Vienna Convention on the Law of Treaties, particularly article 60 thereof. Violations of treaty provisions should, in the first instance, be governed by the provisions set out in the treaty itself. Failing that, the appropriate legal framework would be the law of treaties, not State responsibility.

59. A more fundamental problem arose in relation to violations of international law affecting States parties to a multilateral treaty, covered by article 40, paragraphs 2(e) and (f) and paragraph 3. In those provisions, the confusion between the concept of an "injured" and an "interested" State seemed likely to lead to absurd results, particularly in the light of the practical consequences of such a violation. As drafted, the articles provided that any one of States classified as "injured" had the right to claim reparation in the form of restitution, compensation and satisfaction. There was, however, no basis in international law or practice for enabling States to seek reparation in cases in which they could not show themselves to have been actually harmed. The concept of *erga omnes* obligations was, in fact, considerably more sophisticated than that suggested by the draft articles and did not imply that all States were affected by a violation in the same manner. In the case of interested States, as opposed to injured ones, the consequences of a grave violation would be limited to the right to call for the cessation of the unlawful conduct and for reparation to be made to the injured State. The approach of the draft articles on that issue clearly needed rethinking.

60. With regard to reparation, the basic principle established in article 42 was one of full reparation. Yet both article 42 and the subsequent articles suggested a certain erosion of that principle. Article 42, paragraph 3, which provided that "in no case shall reparation result in depriving the population of a State of its own means of subsistence", gave particular cause for concern. While under a strict interpretation none of the forms of reparation mentioned in the draft could actually justify the confiscation of means of production from a State, the provision, as a number of delegations had noted, created a convenient loophole for a wrongdoing State to abuse and seek to avoid the obligation to provide reparation, even where it had the means to do so.

61. With regard to compensation, his delegation continued to believe that interest, together with loss of profits, should not be optional but obligatory, in keeping with the principle of full reparation. His delegation also agreed that the requirement to pay compensation should be addressed in greater detail. As it stood, article 44 was unhelpfully brief, particularly when compared with the more detailed provisions contained in articles 45 (Satisfaction) and 46 (Assurances and guarantees of non-repetition). In amplifying the guidance contained in the article, useful reference could

be made to the various forms of compensation proposed by the Special Rapporteur in 1989.

62. The issue of countermeasures was arguably the most complex area of State responsibility, reflecting as it did the imperfections of the international legal regime. In dealing with that issue, the draft articles were required, on the one hand, to acknowledge that in practice, the risk of countermeasures might be the only effective deterrent to the commission of wrongful acts, while on the other hand not overly encouraging the use of such measures. The draft articles should, as far as possible, reflect the existing, albeit complex, rules of customary international law relating to countermeasures rather than attempt to recast or improve them. Accordingly, his delegation could not support the provision contained in article 48 requiring an injured State to negotiate prior to taking countermeasures, a requirement which, unlike the demand for cessation or reparation, had no basis in customary international law. Moreover, his delegation did not believe that it was practical to prohibit the taking of countermeasures either prior to or during negotiations, and it was concerned that such a provision might be abused by wrongdoing States, which would use the pretext of negotiations as a tactic for delaying countermeasures. The exception provided by the draft articles, namely, the provision in article 48 concerning interim measures of protection, was not sufficiently clear or unambiguous to resolve the difficulty.

63. His delegation shared the view of those States that had objected to the imbalance inherent in permitting only the wrongdoing State to take the case to arbitration while the injured State had no such right. Such an approach would inevitably lead to an increase in the use of countermeasures to provoke wrongdoing States into referring situations to arbitration.

64. Lastly, he wished to respond to the Commission's question concerning specific consequences attributed by the draft articles to "international crimes". His delegation had previously expressed its reservations concerning the usefulness of the concept of international crimes, reservations that were only strengthened in the light of the specific consequences proposed for the distinction. The provision in article 52 that enabled a State injured by a wrongful act designated as a crime to demand reparation even where that would subject the wrongdoing State to a burden out of all proportion to the benefit which the injured State would gain from compensation or that would seriously jeopardize the political independence or economic stability of the wrongdoing State had no basis in international law. While the consequences affecting all States as set out in article 53 were less problematic, his delegation was concerned that subparagraph (d) as drafted would require a State to cooperate with another State in any measure designed to eliminate the consequences of the crime, even if that State considered the measure to be ill-advised or unlikely to be effective.

65. **Ms. Todorova** (Bulgaria) said that her delegation could accept the simplification of chapter III of the draft articles on State responsibility proposed by the Special Rapporteur provided that it did not weaken the anticipated legal content and regulatory effect of the document. In its statement to the Sixth Committee at the previous session, her delegation had argued its views concerning the content of former draft article 19, which had been deleted from the current version of the draft articles. While appreciating the reasons for the deletion, her delegation wished to stress that the distinction between international delicts and international crimes was a substantive one. It was to be hoped that in its future work on the draft articles, the Commission would take that distinction into consideration, especially in relation to the regime of the consequences of responsibility. It should also take into account contemporary developments in international law, particularly the adoption and forthcoming entry into force of the Statute of the International Criminal Court.

66. She welcomed the Special Rapporteur's conclusion that article 26 *bis*, on the exhaustion of local remedies, should be retained. Her delegation noted with interest the Special Rapporteur's suggestions for reconceptualizing chapter IV (Implication of a State in the internationally wrongful act of another State) and reorganizing chapter V (Circumstances precluding wrongfulness). Her delegation was of the view that the draft articles offered a useful basis for discussion, but that they required further analysis as to the substance, taking into account the dynamic of contemporary international relations. If the evolution and nature of relations between the current subjects of international law were examined more carefully, the Commission's argument that article 29 *ter* (Self-defence) should be linked solely to Article 51 of the Charter of the United Nations would be deemed inadequate.

67. Her delegation had no difficulty with the recommendations contained in paragraph 29 of the Commission's report, and particularly in subparagraph (a). In addition, the delictual infringement of a right of an injured State should be more clearly defined in article 40.

68. Contemporary international law offered sufficient grounds for concluding that interest was an intrinsic part of compensation. That principle should therefore be spelled out more clearly in article 44. With regard to article 58,

paragraph 2, her delegation agreed with the Commission that the adoption of countermeasures should not be linked to the right to take the initiative in submitting a dispute to arbitration. Lastly, her delegation endorsed the Commission's suggestion that the draft articles should deal with the situation that arose when several States were involved in a breach of an international obligation or were injured by an internationally wrongful act.

69. Turning to the draft articles on nationality of natural persons in relation to the succession of States, she said that her delegation had no objections to the Commission's decision to recommend to the General Assembly that the draft articles should be adopted in the form of a declaration, in view of the complexity and length of the procedures relating to the elaboration, adoption and entry into force of an international treaty of a universal character.

70. **Mr. Rogachev** (Russian Federation) said that the much debated question of primary and secondary norms, their permissibility and their relevance to the draft articles on State responsibility should not have a decisive influence on consideration of the text; the Commission should be guided more by practical considerations. There were in fact a number of arguments against having the draft articles on State responsibility contain only secondary norms. For one thing, a growing number of international procedural norms was currently being formulated, so that the division of norms into "primary" and "secondary" was losing its practical significance.

71. His delegation attached great importance to ensuring that the draft articles fully reflected the emerging legal relations in that area. The absence of individual elements of that complex issue, regardless of the reason for their exclusion, would substantially undermine the value of the draft as a whole. His delegation hoped that the discussion on the so-called primary nature of the norms would not be one such reason.

72. His delegation noted with interest the Special Rapporteur's proposed reformulation of draft article 16. However, the proposed wording was not entirely satisfactory, as it encompassed at least two different questions previously dealt with in article 16 (Existence of a breach of an international obligation), article 17, paragraph 2 (Irrelevance of the origin of the international obligation breached), and article 19, paragraph 1. The new wording combined several provisions, each of which was so important that it deserved to be dealt with separately, and would also involve renumbering, which was best avoided. Article 17, paragraph 2, could have been retained with its meaning clarified.

73. His delegation did not agree with the possible interpretations of that paragraph set out by the Special Rapporteur in paragraph 92 of the report. Rather, the paragraph had been intended to enunciate one of the fundamental principles of State responsibility, namely, the irrelevance of the source of an international obligation to the responsibility that arose. His delegation therefore proposed that the paragraph should be reworded to read: "The international legal responsibility of a State which has committed an internationally wrongful act arises regardless of the origin of the international obligation breached by that State." That proposal was based, *inter alia*, on the views expressed in the Commission at its fifty-first session, as reflected in paragraph 103 of the report.

74. His delegation supported the Special Rapporteur's proposal to include a draft article enunciating the principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated (A/54/10, para. 121). With regard to draft articles 24 and 25, his delegation believed that satisfactory results had already been achieved.

75. Chapter IV of the draft articles (Implication of a State in the internationally wrongful act of another State) was of fundamental importance. His delegation did not agree that the articles in that chapter would rarely be applied in practice, but in fact held a diametrically opposite view. From that standpoint, the question of which national legal system had exerted greater influence on the formulation of the provisions in that chapter, as referred to in paragraph 244 of the Commission's report, appeared to be of purely theoretical significance.

76. The question of the responsibility of States acting collectively was particularly important. The question of whether States acted collectively through an international organization or acted collectively without acting through separate legal persons was not crucial; States should not be able to evade responsibility for their wrongful acts even if they acted in the framework of international organizations. His delegation supported the view, set out in paragraph 260 of the report, that the situation addressed by the draft articles was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations. In that context, the requirement that an internationally wrongful act must be internationally wrongful not only for the committing State, but also for the "assisting" State, appeared superfluous.

77. His delegation supported draft article 29 *bis* proposed by the Special Rapporteur and believed that chapter V of the draft articles would be incomplete without it. He was

referring in that connection not only to cases involving the straightforward application of the *jus cogens* doctrine, but to the widespread situations arising from State practice based on Article 103 of the Charter of the United Nations, and involving not only the use of force but also compliance with economic sanctions imposed by the Security Council.

78. He agreed that Part Two of the draft articles should include detailed provisions on countermeasures with a view to the strict regulation of their use. However, his delegation's position on that question would be expressed when the Commission had drafted sufficiently detailed provisions.

The meeting rose at 12.20 p.m.

United Nations A/C.6/54/SR.24

General Assembly
Fifty-fourth session

Official Records

Distr.: General
20 December 1999
English
Original: French

Sixth Committee

Summary record of the 24th meeting
Held at Headquarters, New York, on Tuesday, 2 November 1999, at 3 p.m.

Chairman: Mr. Mochochoko ..... (Lesotho)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82109 (E)

The meeting was called to order at 3.20 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Add.1 and 2)

1. **Mr. Galicki** (Chairman of the International Law Commission), introducing chapter VI of the report of the International Law Commission (A/54/10), noted that at its fifty-first session, the Commission had considered the part of the third report of the Special Rapporteur which it had not been able to consider at its fiftieth session, and also the first part of the fourth report on the topic. It had adopted 18 draft guidelines pertaining to the definition of reservations and interpretative declarations, which constituted a first chapter of the Guide to practice which it had set out to prepare. However, in the light of the consideration of interpretative declarations it had adopted a new version of draft guideline 1.1.1 (Object of reservations) and of the draft guideline without a title or number which had become in the new version draft guideline 1.6 (Scope of definitions). The draft guidelines were accompanied by commentaries and the first chapter was divided into six sections concerning: definition of reservations (sect. 1); definition of interpretative declarations (sect. 2); distinction between reservations and interpretative declarations (sect. 3); unilateral statements other than reservations and interpretative declarations (sect. 4); unilateral statements in respect of bilateral treaties (sect. 5) and scope of definitions (sect. 6).

2. With regard to draft guideline 1.1.1, "Object of reservations", which had been adopted in 1998, and which related to "across-the-board" reservations, the Commission had adopted it on the understanding that it would be re-examined in the light of the discussion on interpretative declarations. It had been re-examined and redrafted in order to define accurately and precisely the practice of reservations referring to a treaty as a whole with respect to certain specific aspects. Such reservations excluded or limited the application of a treaty to certain categories of persons, objects, situations, territories, or in certain specific circumstances or for special reasons relating to the international status of their author. That draft guideline purported to remove any ambiguity or controversy regarding that widespread practice which gave a broad interpretation to the Vienna definition. Such precision in no way prejudged the permissibility or impermissibility of general and imprecise reservations. Moreover, the new formulation avoided any confusion with declarations relating to the implementation of the treaty at the internal level or with general statements of policy which were the object of other draft guidelines.

3. Draft guidelines 1.1.2, 1.1.3, and 1.1.4 had been adopted in 1998, and in 1999 the Commission had adopted draft guideline 1.1.5, "Statements purporting to limit the obligation of their author", which clarified the Commission's view of the question of "extensive" reservations, often confused with statements designed to impose new obligations on the other parties, not provided for by the treaty, and which were not reservations within the meaning of the present Guide to practice. Draft guideline 1.1.5 related only to statements which, because they were designed to exempt their author from certain obligations under the treaty or widen its rights, restricted by correlation, the rights of the other contracting parties or increased their obligations. To the extent that all such statements constituted reservations, the temporal element came into play, and they should be made only when the State expressed its consent to be bound by the treaty.

4. Draft guideline 1.1.6 concerned unilateral statements purporting to discharge an obligation by equivalent means, which also constituted reservations. Since such a statement purported to modify the legal effect of some provisions of the treaty in their application to its author, it therefore came within the framework of the definition of reservations.

5. The second section of the first chapter of the Guide to practice concerned the definition of interpretative declarations (draft guideline 1.2). The definition adopted by the Commission filled a certain vacuum since both the 1969 and 1986 Vienna Conventions were silent on that matter. He hoped that guideline would clarify the distinction between interpretative declarations on the one hand and reservations on the other hand, or other types of unilateral declarations made in respect of a treaty. The latter was considered in another section of the first chapter.

6. Two points in common between reservations and interpretative declarations were that both were unilateral statements and in both the phrasing or name chosen by their author was irrelevant. Their aim was different: interpretative declarations were aimed at interpreting the treaty as a whole or certain of its provisions, whereas reservations aimed to exclude or modify the legal effect of certain provisions of the treaty in their application to their author. The interpretation purported to clarify the meaning and scope that the author, State or international organization attributed unilaterally to the treaty or to certain of its provisions.

7. Another point worth mentioning was whether the temporal limitation applicable to reservations was justified with respect to interpretative declarations. The Commission had thought not, since such interpretations might coexist with other simultaneous, prior or subsequent interpretations which might be made by other contracting parties or third parties and might be formulated at any time in the life of the treaty. Of course, that should not be seen as an encouragement to formulate interpretative declarations at inappropriate times, since it could lead to abuse and create difficulties. Lastly, that definition again in no way prejudged the validity or effect of such declarations.

8. Draft guideline 1.2.1 addressed the issue of conditional interpretative declarations, a practice whereby a State or an international organization made its interpretation a condition of its consent to be bound by the treaty. Although such declarations were closer to reservations than to interpretative declarations in that they sought to produce a legal effect on the provisions of the treaty, the Commission did not believe that those two categories of unilateral statements were identical. Even if the distinction was not always obvious, there was a great difference between application and interpretation. That was also the direction taken in jurisprudence, as shown in the decision of the European Court of Human Rights in the *Belilos* case and the Arbitral Tribunal on the case of the *Mer d'Iroise* between France and the United Kingdom.

9. The fact remained that the category of unilateral declarations referred to came very close to reservations, particularly since the essence of both was to pose a condition. From that perspective, the Commission believed that the temporal element was indispensable for conditional interpretative declarations in order to prevent, insofar as possible, disputes among the parties as to the reality and scope of their commitments under the treaty. Consequently, the instances in which a reservation might be formulated, which were outlined in draft guideline 1.1.2, adopted in 1998, could be transposed to the formulation of conditional interpretative declarations.

10. Draft guideline 1.2.2 addressed the issue of interpretative declarations formulated jointly by several States or international organizations and was the counterpart of draft guideline 1.1.7 on reservations formulated jointly; it reflected common practice. As in the case of reservations, the possibility of joint formulation of interpretative declarations could not undermine the unilateral character of such declarations. Moreover, the legal regime applicable to jointly formulated interpretative declarations was not the same as the one applicable to reservations formulated jointly.

11. The third section of the first chapter of the Guide to practice concerned the distinction between reservations and interpretative declarations. It also dealt with the method of implementing the distinction and with certain "indicators" that were useful in that respect. Draft guideline 1.3 stated that the definition of a unilateral statement as a reservation or an interpretative declaration was determined by the legal effect it was purported to produce. In other words, reservations were distinguished from interpretative declarations principally by the objective pursued by the State or international organization that made them: in formulating a reservation, the author purported to exclude or modify the legal effect on itself of certain provisions of the treaty, or of the treaty as a whole with regard to certain aspects, while, in formulating an interpretative declaration, it intended to specify or clarify the meaning and scope that it attributed to the treaty or to certain of its provisions.

12. Draft guideline 1.3.1 concerned the method of implementation of the distinction and, in that regard, the Commission considered that the point of departure should be the principle that the purpose sought was reflected in the text of the statement. At first glance, then, it was a problem of interpretation that could be resolved by means of the normal rules of interpretation in international law. However, in the Commission's view, while the rules provided useful indications, they could not be transposed purely and simply to reservations and interpretative declarations because of their special nature. International jurisprudence adopted an identical position and considered that the rules of interpretation of a treaty provided useful guidelines for the interpretation of unilateral statements. That position was reflected in draft guideline 1.3.1, inspired by the wording used by the International Court of Justice in the *Fisheries Jurisdiction Case (Spain v. Canada) Jurisdiction of the Court*, and started with the interpretation of the statement in good faith in accordance with the ordinary meaning of its terms, in the light of the treaty to which it referred. Due regard should also be given to the intention of the declarant, insofar as it could be ascertained. Lastly, that method could be transposed to the distinction between simple and conditional interpretative declarations.

13. Draft guideline 1.3.2, entitled "Phrasing and name", stated that those terms provided only an indication of the purported legal effect. In the Commission's view, while the phrasing and name of a unilateral statement did not constitute part of the definition of an interpretative declaration any more than they did of the definition of a reservation, nonetheless, they formed an element of appraisal which must be taken into consideration and which could be viewed as being of particular significance when a State formulated both reservations and interpretative declarations with regard to the same treaty at the same time. In the latter case, the phrasing or name given by the declarant constituted

a rebuttable presumption on the character of the unilateral statement.

14. Draft guideline 1.3.3 focused on the particular case of the formulation of a unilateral statement when a reservation was prohibited. In that case, there was a rebuttable presumption that such a statement was not a reservation, consonant with the well-established general principle of law that bad faith was not presumed.

15. Section 4 of the first chapter dealt with unilateral statements other than reservations and interpretative declarations and often confused with them. It included six draft guidelines. Draft guideline 1.4 could be regarded as a general exclusionary clause purporting to limit the scope of the Guide to practice to reservations and interpretative declarations, to the exclusion of other unilateral statements of any kind which were formulated in relation to a treaty. Draft guideline 1.4.1 referred to statements to undertake unilateral commitments, in other words obligations going beyond those imposed upon the declarant by the treaty, which were neither reservations nor interpretative declarations. Draft guideline 1.4.2 concerned unilateral statements purporting to add further elements to a treaty, which, the Commission believed, constituted proposals to modify the content of the treaty. Draft guideline 1.4.3 referred to statements of non-recognition which, in the Commission's view, did not constitute reservations and, accordingly, were outside the scope of the Guide to practice, even if they purported to exclude the application of the treaty between the declaring State and the non-recognized entity. The Commission avoided specifying the nature of that entity, which could be a State, a Government or any other entity, or even certain situations, notably territorial ones.

16. Draft guideline 1.4.4 concerned general statements of policy, which were often made on the occasion of the signature of a treaty or the consent to be bound by a treaty, whereby the State or organization formulating them expressed its views on the treaty or on the subject matter of the treaty, without purporting to produce a legal effect on the treaty. Lastly, draft guideline 1.4.5 referred to statements concerning modalities of implementation of a treaty at the internal level, without purporting as such to affect the rights and obligations of the declarant towards the other contracting parties.

17. Section 1.5 dealing with unilateral statements in respect of bilateral treaties comprised three draft guidelines regarding reservations and interpretative declarations to bilateral treaties. Draft guideline 1.5.1 addressed the question whether reservations to bilateral treaties were possible. The Commission had concluded that unilateral statements purporting to obtain from the other party a modification of the provision of the treaty to which the author subjected the expression of its final consent to be bound did not constitute reservations in the usual meaning of the term, since they purported to modify the actual provisions of the treaty. Having reached that conclusion, the Commission had decided to examine once and for all the issues pertaining to "reservations" to bilateral treaties, in draft guidelines 1.5.2 and 1.5.3, since it did not intend to return to the matter in the context of the topic of reservations to treaties.

18. Draft guideline 1.5.2 on interpretative declarations in respect of bilateral treaties reflected a general practice accepted in international law. Draft guideline 1.5.3 concerned the legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party. In the Commission's view, after acceptance the interpretative declaration constituted the authentic interpretation of the treaty. The final draft guideline 1.6 entitled "Scope of definitions", adopted the previous year without a title or number, had been reformulated by the Commission in the light of the discussions on interpretative declarations. The fundamental idea was unchanged, namely, that the permissibility and effects of unilateral statements included in the first chapter of the Guide to practice under the rules applicable to them were not otherwise affected by the definition.

19. In conclusion, he recalled that in 1995 the Commission had sent States and organizations a questionnaire on the topic of reservations to treaties. The response had been extremely encouraging, and he wished to thank those that had responded, but he would like to ask States that had not replied to the questionnaire to do so. It was unnecessary to stress how useful the answers were to the Special Rapporteur and to the Commission for the continuation of their work on the topic.

20. **Mr. Leanza** (Italy), referring to chapter V of the Commission's report, said that the position of the Government of Italy was that the draft articles on State responsibility should deal with exceptionally serious wrongful acts, or international crimes, as well as ordinary wrongful acts, or international delicts.

21. In general his delegation approved the Commission's decision to shorten and simplify chapter III of Part One of the draft articles on State responsibility. Too many provisions made any treaty instrument harder to grasp, and a highly detailed breakdown of abstract cases was more appropriate to domestic normative law and detrimental to the fluidity and flexibility proper to international law. However,

the simplification had gone too far in eliminating articles 20, 21 and 23, setting forth the distinction between obligations of conduct, obligations of result, extended obligations of result and obligations of prevention. Elimination of superfluous rules should not go so far as to ignore current State practice in international relations. Consideration of State practice and the decisions of international courts revealed the nearly constant application of the distinction between obligations of result and obligations of conduct, particularly in relation to the protection of fundamental human rights. His delegation felt that the distinction could not be completely eliminated from the draft articles; however, in order to make the draft more straightforward yet complete, a general reference to the distinction could be included in article 16, or the original provision could be worded more simply. Merely to mention the distinction in the commentary, as suggested, was not an acceptable solution, since the commentary had only an interpretative and not a normative function.

22. With regard to the exhaustion of local remedies contemplated in draft article 26 *bis*, leaving aside for the moment theoretical debates about the nature and significance of the rule on prior exhaustion of local remedies, it should be clarified that the rule concerned not the time when a diplomatic complaint or international judicial claim was presented, but the time when the internationally wrongful act was actually committed and thus triggered the international responsibility of the foreign State on which the complaint or claim was based. In other words, it concerned the determination of whether an international wrong had been committed. If it had not, clearly State intervention was not possible, for lack of grounds. In that light, the wording of article 26 *bis* was unsatisfactory, as it only begged the question. The issue was not one of coordinating the norms on the objective element of State responsibility with the exhaustion of local remedies rule but of identifying the moment when the internationally wrongful act occurred and evaluating the international responsibility of the State at the international level. It was a matter of substance and not of the implementation of State responsibility. The question was of crucial importance and should be reconsidered.

23. His delegation fully supported the Commission's decision to retain chapter IV of Part One of the draft articles. The chapter dealt with a fundamental aspect of responsibility, the attribution of a wrongful act to a State. The issue involved not primary rules setting forth the precise conduct a State must follow but secondary rules governing the State's international responsibility. The situation was further complicated when several States acted jointly in the perpetration of the wrongful act. The wording of articles 27, 27 *bis*, 28 and 28 *bis* appeared to satisfy the requirements of the rule of customary law limiting the applicability of international agreements to the States parties.

24. Chapter V of Part One of the draft articles dealt with the circumstances precluding wrongfulness, a highly important aspect of the regime of international State responsibility for wrongful acts. The wide-ranging and thorough debate on the topic in the Commission had inspired a general rethinking about circumstances precluding wrongfulness and had led to the softening of certain positions which the Italian Government had found too radical and completely out of step with State practice. An example was the proposal to delete article 29 on the consent of the injured State as a circumstance precluding wrongfulness. The importance of consent in that regard was undeniable, with the sole proviso that such consent must be in force at the time of the act, since consent *a posteriori* would constitute a waiver on the part of the injured State of its right to claim reparation, without doing away with the wrongfulness of the act, which was already established. His delegation set great store by article 29 and was satisfied with the wording. It also felt that an article recognizing the precedence of norms of *jus cogens* over other norms of international law was useful, and it was therefore in favour of retaining article 29 *bis*, even if it were rarely applied. He failed to understand why the definition of "peremptory norm" included in the draft adopted by the Commission in 1996 had been omitted.

25. As far as countermeasures were concerned, that topic was obviously linked to the outcome of the Commission's consideration of the regime of countermeasures in Chapter III of part two of the draft articles. Countermeasures were recognized under international jurisprudence as having the effect of precluding the wrongfulness of a conduct as a reaction to the wrongful acts of others. International practice was not very clear on the issue of whether countermeasures should be taken only after every possible concerted dispute settlement procedure had been exhausted. Since it could not be affirmed that a strict rule had been established in that area, nothing could prevent a State in a state of necessity from taking such countermeasures as it deemed appropriate. The right to self-defence still had a function in modern international law, despite its institutionalization and verticalization. There was no need to include a provision on procedures to invoke a circumstance precluding wrongfulness, because the practice of inter-State relations in that regard was flexible and informal. One only needed to think about the problems of implementation and the discussions on the articles of the 1969 Vienna Convention on the Law of Treaties relating to objections to reservations

or to the articles on the regime of circumstances of invalidity or extinction of international agreements. As far as responsibility was concerned, it should be borne in mind that most circumstances precluding wrongfulness operated automatically. It was therefore impossible, and in any case useless, to give advance notice of them. As far as the "clean hands" principle was concerned, regardless of its legal nature — metajuridical principle or principle of positive law — and its consolidation as a norm of general international law, it did not constitute in any case whatsoever a circumstance precluding wrongfulness. Therefore, it should not be treated as such. Likewise, the issue of due diligence did not come under chapter V, because it was logically connected to the distinction between breaches of the obligation of result, conduct and prevention. It was not necessary to include duress among the circumstances precluding wrongfulness, since all the hypotheses of duress provided for by the 1969 Vienna Convention on the Law of Treaties were already covered by article 31 on *force majeure*.

26. Referring to Chapter VI of the report on reservations to treaties, he recalled the decision to reformulate draft guideline 1.1.1 on object of reservations. In the previous version, reference had been made to the possibility of the reservation covering the treaty as a whole where the provision on the definition of reservations referred only to exclusions or modifications of the legal effect of certain specific provisions of the treaty. The new wording sought to eliminate the contradiction between the two texts by specifying that a reservation could be made to the treaty as a whole, but only in respect of specific aspects of its implementation. That approach reflected better the practice of across-the-board reservations that excluded the application of a treaty as a whole to certain categories of persons, objects, situations or circumstances. While that point clarified the terms under which it was possible *in abstracto* to conceive of a reservation to a treaty as a whole, it made it necessary to explore further the various aspects of the related issue of limitations to the admissibility of reservations. While the issue of the definition of reservations differed from that of their admissibility and legal effects, an explicit definition of across-the-board reservations could contribute to intensifying an already widespread practice of entering unconditional reservations of that type, if the scope of the provisions of the Vienna Convention with respect to the limits of admissibility, as they related to compliance with the purposes and objectives of the treaty, was not specified.

27. In that regard, the Commission might consider drafting a special regime for reservations to treaties other than bilateral treaties, including human rights treaties and codification agreements. Human rights treaties were a special category of international agreements for which the regime provided by the 1969 Vienna Convention relating to the effects of inadmissible reservations was unsatisfactory. The indivisible obligations imposed on States parties by those international instruments rendered the bilateral reservations and objections regime ineffective. In any case, the regime provided by the Vienna Convention did not preclude the establishment of special regimes designed to clarify the meaning and possible implications of essential clauses such as the limitation to the protection of the purpose and goal of the treaty. That issue was of considerable importance to the development of contemporary international practice. Moreover, in the context of such practice, there was an increasingly marked tendency to follow specific lines of conduct in the case of reservations to and denunciations of human rights treaties. The States members of the European Union and the Council of Europe tended to reduce reservations to such treaties by negotiating with the author States to withdraw or amend them, or by proposing concerted objections. The practice of concerted objections was an element that should be taken into account in the Commission's future work in order to establish and implement a special regime for reservations to non-synallagmatic treaties.

28. He fully endorsed the solution adopted with respect to the definition of unilateral declarations purporting to increase the rights or obligations of States beyond what was provided by a treaty. Those reservations could not constitute reservations within the strict meaning of the term, because they had no possible binding force under the treaty. In that regard, the draft guidelines themselves stipulated that such statements were outside the scope of the Guide to practice and could, depending on their content, be considered either as unilateral obligations or proposals to modify the treaty.

29. He endorsed the decision to treat the definition of interpretative declarations separately in the guidelines because, notwithstanding the silence of the 1969, 1978 and 1986 Vienna Conventions on that issue, international practice provided for frequent recourse to interpretative declarations and the difference between them and reservations very often seemed extremely subtle. Likewise, the clarification to the effect that a unilateral act should not be identified on the basis of its form, but rather on the basis of the effects it sought to produce, should be retained. Indeed, the literal content of any declaration or designation thereof was but one element that went to ascertain its true nature.

30. While the guidelines adopted by the Commission at its previous session were very clear and detailed, account

should be taken of the growing criticism of the current procedure for reservations because of its ineffectiveness in relation to non-synallagmatic agreements. Since the Commission was currently developing norms in that area that would not be binding on States, it might be useful for it to address the issue by drawing on the attempts that had already been made to ensure that the above-mentioned agreements were universal in scope in terms of both form and substance, as a result of reservations contrary to the objectives and goals of treaties. The codification and progressive development of international law required the Commission to steer clear of conventional forms when such forms were disputed in inter-State relations.

31. **Mr. Berman** (United Kingdom) said that, since his arrival in the Sixth Committee in 1970, the participation of delegations in the work of the Committee, and especially in discussions and negotiations point by point and issue by issue, seemed to have diminished and become more calculated, owing to the growing number of Member States and the emergence of groups of States presenting a single position. On the positive side, that favoured mediation but, on the negative side, it led to the adoption of longer, muddier and less legally careful resolutions, which supposedly rested on a notion of "general agreement". In the past, the voting on draft resolutions had sometimes been a trial of strength, and sponsors had been disinclined to negotiate; but negotiations had been based on real issues and preceded by a real debate. Currently, although consensus was the norm, it was also unfortunately purely formal and involved texts that lacked legal meaning and weight. That phenomenon affected not only the Sixth Committee but also the other Main Committees of the General Assembly, and even other United Nations bodies such as the Security Council, whose decisions were directly binding in law.

32. To remedy that situation, the burden of work during and between sessions of the International Law Commission should, first and foremost, be divided among a greater number of delegations, for the sake not only of fairness but also of independence and with a view to genuinely representing the different existing points of view. Governments were also recommended to continue to appoint to the Sixth Committee young lawyers who could gain invaluable experience in international law but would also lend the Committee their dynamism and legal skills.

33. He had compared not only the working methods of the Committee but also the annual ILC report with what it had been in 1970, and noted with satisfaction that the report showed many improvements in form and substance and was easier to read. In his view, the proposal to split the sessions of ILC into two shorter sessions would reap gains beyond the Commission's expectations. The modernization of the Commission's working methods, largely attributable to the efforts of new delegations that had joined since 1970, did not obviate the need to continue to survey the field for new topics to fuel its future debates. Governments had a part to play in that process.

34. Turning to the difficult question of the role of the Committee and of member delegations in analysing the report of the Commission, he stated that dialogue was an essential part of that analysis and consisted of an exchange between two speakers. For reasons related to the nature of the annual debate and the quality of governmental responses to Commission reports and questionnaires, that exchange was not as fruitful as it should be. The introduction of mini-debates on individual chapters of the report instead of a blockbuster debate on the whole report had brought about a reduction in the length of statements and introduced some variety into the topics dealt with during the session. The question should nevertheless be asked whether that reform had improved the quality of the debate, since the consideration of a topic lasted only two or three meetings, obliging delegations to deliver statements either prepared in advance or hastily written at the last moment.

35. On the other hand, he did not miss the former practice of sending Commission members to the Sixth Committee to offer their Governments' views on texts they had helped to formulate. Confusing the roles of Commission member and government representative had not ensured independence or objectivity at the time, and would do so even less now. The problem arose from the fact that neither the members of the Sixth Committee nor the members of the Commission had a clear idea of what the Sixth Committee's annual debate on the Commission's report should be. The occasion for delegations simply to pay respect to the work done by the Commission or to express their views and concerns with a view to guiding its future work? The occasion for ILC to hear the immediate reaction of States to its report or subsequently to receive detailed comments and observations? That approach could perhaps be replaced by a series of informal meetings throughout the year. The question was what form the debate should take and whether its form should remain unchanged year after year. In his view, the debate did not need to take the same form every year. Commission members might be invited to the General Assembly to attend the meeting of legal advisers for an informal exchange; or informal meetings might be organized on ILC topics for the special rapporteurs dealing with those subjects, other Commission members, and delegations. He hoped that his proposals would be followed up in 2000, and

that in the interim they would be given careful consideration, particularly during the Commission's fifty-second session.

36. **Mr. Szénási** (Hungary) said that his delegation, which endorsed the draft guidelines in general, would like to comment on three subjects: impermissible reservations, reservations to bilateral treaties, and conditional interpretative declarations to bilateral treaties. Regarding the matter of impermissible reservations, his delegation noted with satisfaction that the Commission had set out, in the commentary on the definitions, some basic clarifying principles. While his delegation shared the view of ILC with regard to the permissibility of across-the-board reservations, it was firmly convinced that those reservations should continue to be prohibited in the case of certain multilateral normative treaties, such as human rights treaties. It would perhaps be useful for ILC to explore, at a later stage, the question of the admissibility of reservations to those treaties, including the criteria for such admissibility and the possible role to be played by the bodies monitoring human rights treaties. At a later stage it could revert to the question of definitions and include elements on impermissible reservations either in the draft guide or in the commentary.

37. Hungary shared the view of the Special Rapporteur that unilateral statements in respect of bilateral treaties did not constitute reservations. In almost all instances, the aim of the parties formulating that sort of statement was to renegotiate the treaty in question and to obtain the agreement of the other party to the modification of a particular provision. Such reservations could therefore be considered tantamount to a refusal to accept the treaty as drafted. Interpretative declarations that were not aimed at changing the legal effect of a treaty should be admissible. It was nonetheless true that, as the Commission had indicated, a number of elements helped to blur the necessary distinction between reservations and interpretative declarations. Given the fact that most States considered reservations to bilateral treaties to be impermissible, the Commission must further clarify the distinction between the two types of interpretative declaration and their legal consequences, especially in relation to bilateral treaties.

38. **Mr. Alabrune** (France) said that the French term "directives" used to describe the Commission's draft guidelines was not satisfactory because it suggested compulsory rules. The term "lignes directrices" would be more appropriate in the French text.

39. He welcomed the Commission's efforts to define across-the-board reservations, the usefulness of which had been shown in practice. They must be distinguished from general reservations, which made any commitment a hollow one.

40. While satisfied with the substance of the draft guidelines on object of reservations and statements purporting to discharge an obligation by equivalent means, he wondered if it was appropriate for them to be in the form of guidelines. The draft guidelines on statements purporting to limit the obligations of their author and statements purporting to discharge an obligation by equivalent means could be deleted and become new paragraphs in the draft guideline on object of reservations. A simple reference could then be made in the related commentary to statements purporting to undertake unilateral commitments.

41. His delegation was particularly interested in the draft guideline on the definition of interpretative declarations because experience had shown that there were difficulties in that area. It was therefore very worthwhile for the Commission to better define that issue. The method adopted by the Special Rapporteur and the criterion of intent which had been chosen to define interpretative declarations were quite satisfactory because they allowed a distinction to be made between interpretative declarations and reservations. The definition of an interpretative declaration must however specify the moment at which the State or international organization making such a declaration was required to formulate it. It would be preferable to confine such declarations to a limited period of time, which could be the same as that for formulating a reservation. Removing any mention of a limited period of time from the definition of an interpretative declaration would, moreover, run the risk of weakening the time element characteristic of reservations. That time element was just as necessary in the case of conditional interpretative declarations.

42. He agreed that statements of non-recognition, by which certain States indicated that their participation in a treaty did not imply recognition of an entity as a State, were outside the scope of the Guide to practice. Such statements did not purport to exclude or modify the legal effect of particular provisions of the treaty but sought rather to deny the entity in question the capacity to make a commitment, and therefore to preclude any treaty relationship with it. Statements of general policy which did not have a sufficiently close link with the treaty to which they referred must also be excluded from the scope of the Guide to practice.

43. The draft guideline on statements concerning modalities of implementation of a treaty at the internal level, in its current form, posed a real problem. The text stated that such statements were outside the scope of the Guide to

practice only insofar as they had no effect on the rights and obligations of their author vis-à-vis the other contracting parties. Yet in cases where the treaty in question made specific modalities of implementation compulsory for the internal legal systems of States parties, such statements could constitute veritable reservations, even if the desire to modify or exclude the legal effect of certain provisions of the treaty was not immediately apparent. It would therefore be more prudent to adopt the position that a statement concerning modalities of implementation of a treaty at the internal level was strictly for information purposes if, on the one hand, it did not purport to have any effect on the rights and obligations of the State which formulated it and if, at the same time, it was incapable of having such effect.

44. Finally, in relation to "reservations" to bilateral treaties, he believed that statements of that type did not constitute reservations because they did not lead to any modification or exclusion from legal effect of certain provisions but rather modified the treaty itself. The title of the draft guideline should be modified to indicate clearly that it dealt with statements aimed at modifying a bilateral treaty.

45. **Mr. Magnuson** (Sweden), speaking on behalf of the Nordic countries, noted the welcome tendency among States to reduce the number of reservations attached to human rights instruments. Another positive development was that some States had made their reservations more precise. Unquestionably, the consistent policy of objecting to reservations or to modifications to reservations which might undermine the integrity of a treaty had played an essential role in promoting that tendency.

46. At the current stage of discussions, the Nordic countries found the draft guidelines developed by the Commission acceptable, with one exception. According to draft guideline 1.1.3 (Reservations having territorial scope), a unilateral statement by which a State purported to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constituted a reservation. Yet the legal situation with respect to the various parts of a territory varied considerably between States, as did the competence of the central Government to legislate for autonomous regions. Since there were also various kinds of treaties, it was not at all obvious that a statement of the kind referred to in guideline 1.1.3 constituted a reservation. Some treaties explicitly forbade reservations. If a unilateral statement of the kind referred to in guideline 1.1.3 was characterized as a reservation, it could have the unfortunate effect of preventing some States from ratifying the treaty in question. The Nordic countries were of the view that no decision as to whether or not such a statement was a reservation could be made without first analysing the object of the treaty and the effect that the statement would have on its application. It was very probable that after such an analysis it would become obvious that some statements having territorial scope could be considered interpretative declarations and others reservations.

47. The Vienna regime regarding reservations had gaps, particularly in the area of inadmissible reservations, reservations incompatible with the object and purpose of the treaty or other prohibited reservations. Thus the effect of an objection to a reservation was that the provisions to which the reservation related did not apply between the two States, which was often the opposite of what the objecting State wanted, particularly in the sphere of human rights. Finally, the admissibility of reservations seemed to be attracting growing interest among States, and the Nordic countries were disappointed that that issue would not be dealt with until 2001. He therefore encouraged the Special Rapporteur to begin study of the issue of inadmissible reservations as soon as possible, in particular with regard to the doctrine of severability.

The meeting rose at 5.20 p.m.

United Nations A/C.6/54/SR.25

General Assembly
Fifty-fourth session

Official Records

Distr.: General
14 December 1999
English
Original: French

Sixth Committee

Summary record of the 25th meeting
Held at Headquarters, New York, on Wednesday, 3 November 1999, at 3 p.m.

Chairman: Mr. Mochochoko ..... (Lesotho)
later: Ms. Hallum ..... (New Zealand)
later: Mr. Mochochoko ..... (Lesotho)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session *(continued)*

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82151 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session *(continued)* (A/54/10 and Corr.1 and 2)

1. **Mr. Galicki** (Chairman of the International Law Commission) introduced chapter VIII (Unilateral acts of States), chapter IX (International liability for injurious consequences arising out of acts not prohibited by international law - Prevention of transboundary damage from hazardous activities), and chapter X (Other decisions and conclusions of the Commission) of the report of the Commission (A/54/10 and Corr.1 and 2).

2. Referring to chapter VIII, he recalled the second report of the Special Rapporteur on unilateral acts of States, which had stated that the 1969 Vienna Convention on the Law of Treaties was the appropriate frame of reference for the Commission's present work. The Special Rapporteur had also mentioned various issues for the consideration of the Commission, including the unilateral declaration by nuclear-weapon States containing negative security guarantees in the context of disarmament negotiations formulated outside the context of bilateral or multilateral negotiations without the participation of the addressees, the non-nuclear-weapon States; autonomy of the unilateral act; unilateral acts of individual origin, of collective or joint origin; and the declaration as the basic instrument in the law governing unilateral acts. The Special Rapporteur had gone on to examine some questions raised in the Sixth Committee about the relationship between unilateral acts and acts pertaining to international liability, international organizations, estoppel, reservations and interpretative declarations.

3. The Special Rapporteur had introduced draft articles which had served as a basis for discussion. Article 1 concerned the scope of the draft; the others related to the definition of unilateral legal acts (art. 2), the capacity of States to formulate unilateral legal acts (art. 3), the representatives of States possessing authority to perform unilateral acts (art. 4), subsequent confirmation of a unilateral act formulated without authorization (art. 5), the expression of consent (art. 6) and the causes of invalidity of a unilateral act (art. 7). Paragraphs 527 to 576 of the report summarized the debate on the second report, after which the Commission had decided to reconvene the Working Group on Unilateral Acts of States and to appoint the Special Rapporteur Chairman of the Working Group. The Commission had considered the report of the Working Group and had adopted it as amended by the Commission.

4. The task of the Working Group was (a) to agree on the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice, (b) to set the general guidelines according to which the practice of States should be gathered, and (c) to point the direction that the work of the Special Rapporteur should take in the future. He gave a detailed account of the discussions held by the Working Group as set out in paragraphs 582 to 588 of the report. The discussions covered various elements of the definition of unilateral acts: "legal" (para. 583), "unequivocal" (para. 584), "publicity" (para. 585), "international community as a whole" (para. 586), "with the intention of acquiring international legal obligations" (para. 586) and "autonomy" (para. 587). Following that exchange of views, the Working Group had agreed that the following concept should be taken as the basic focus for the Commission's study on the topic, and as a starting point for the gathering of State practice thereon:

> "A unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or organization concerned."

It had also been noted in the Working Group that a unilateral statement could be made by one or more States jointly or in a concerted manner.

5. The Working Group and the Commission had also considered the setting of general guidelines according to which the practice of States should be gathered. It had also been suggested that the Secretariat should prepare a typology or catalogue of the different kinds of unilateral acts to be found in State practice. It needed not to be exhaustive but sufficiently representative of the wide variety of that practice. It had been noted, however, that the present sources where such practices could be found were not representative enough, since only some States, and not necessarily from all regional groups or legal systems, possessed up-to-date digests of their international practice. In order to supplement such sources, it had been suggested that the members of the Commission should cooperate with the Special Rapporteur by providing him with materials sufficiently representative of the practice of their respective countries.

6. It had therefore been agreed that the Secretariat in consultation with the Special Rapporteur should elaborate and send to Governments, within a reasonable deadline, a questionnaire requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

7. The questionnaire to be prepared by the Secretariat and the Special Rapporteur would be sent shortly to Governments for their urgent attention. On the basis of the concept of unilateral act defined by the Commission and its Working Group, the questionnaire asked for materials and specific information on the precise categories of unilateral acts, such as promise, protest, recognition, waiver or notification, particularly on the eight elements detailed in paragraph 594 of the report. It also asked each Government to what extent it believed that the rules of the 1969 Vienna Convention on the Law of Treaties could be adapted *mutatis mutandis* to unilateral acts. States were also encouraged to refer to any aspect of their practice in the area of unilateral acts not covered by the questionnaire.

8. Turning to chapter IX of the report, entitled "International liability for injurious consequences arising out of activities not prohibited by international law", he recalled that the topic had been divided into two parts and that the Commission had decided to proceed first with the question of prevention. The draft articles prepared by the Special Rapporteur and circulated to States for their comments would be examined on second reading at the next session. Only two States had forwarded their comments, and those which had not already done so should submit them to the Commission.

9. He summarized the three options that the Special Rapporteur had proposed in his report, regarding the future course of the work on liability; they appeared in paragraph 604 of the Commission's report. Most of the members who had spoken had preferred the second option, which was to suspend the work on international liability until the Commission had finalized the second reading of the draft articles on the regime of prevention of dangerous activities. The Commission would welcome the views of Governments on that specific issue.

10. Lastly, presenting the final chapter, entitled "Other decisions and conclusions of the Commission" (chap. X), he listed some of the most important points, commencing with the relationship between the Commission and the Sixth Committee. In paragraph 10 of resolution 53/102, the General Assembly had requested the Commission to submit recommendations for enhancing the dialogue between the Commission and the Sixth Committee. Several steps had been taken to that end and, in particular, the Commission had identified several issues on which it required comments; they had been highlighted in chapter III of the report, entitled "Specific issues on which comments would be of particular interest to the Commission". The objective was to bring more clarity to the exchange of ideas. It would be recalled that in recent years, several Special Rapporteurs had been able to address the Sixth Committee directly when their respective topic had been under discussion. An indispensable part of the dialogue between the Commission and Governments was the procedure of written comments by Governments in response to particular requests of the Commission. The Commission was aware of the burden on Governments, but remained concerned by the insufficient number of replies and wished to underline the importance of the opinions of Governments from different parts of the world.

11. The second aspect to be underlined related to cooperation between the Commission and other bodies concerned with international law, and the request that the General Assembly had addressed to the Commission in resolution 53/102 that it should further strengthen such cooperation. He said that the Commission was sparing no effort in that regard, and recalled that on various occasions it had held consultations with individual experts on specific topics, either in a formal manner, as in the case of delimitation of the territorial sea of two adjacent States, or informally, as in the case of consultations with experts from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the topic of nationality including statelessness. The Commission had also benefited from the work of a group of experts in Japan, the International Law Association and the American Society of International Law. For many years, the Commission had been exchanging views with experts of the International Committee of the Red Cross on international humanitarian law, which had been useful in the preparation of the draft Code of Crimes against the Peace and Security of Mankind. The Commission also maintained close relations with academic institutions, including the Geneva Institute for International Studies. Many contacts were of an informal nature and had no place in the Commission's report; however, he assured the Sixth Committee that the Commission and its Special Rapporteurs were well aware of the utility of such contacts.

12. The last point on which he wished to call the attention of the delegations concerned paragraph 9 of resolution 53/102, in which the General Assembly requested the Commission to examine the advantages and disadvantages of a split session. The arguments of the Commission, which recommended a split session, were developed in paragraphs 635 to 639 of its report, and he gave a detailed summary of the conclusions.

13. The Working Group on the long-term programme of work would present a detailed report to the Sixth Committee in 2000, where it would propose the programme for the next quinquennium. The work programme for the remainder of

the quinquennium was contained in paragraphs 643 and 644 of the current report.

14. Before concluding, he indicated that the Commission had continued to cooperate with the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe. He also mentioned that the thirty-fifth session of the International Law Seminar had been held at the Palais des Nations from 14 June to 2 July 1999; the Seminar did extremely useful work and it was hoped that the generous contributions of Governments would make a session possible in 2000.

15. **Mr. Yamada** (Japan), commenting on chapter VI of the Commission's report, entitled "Reservations to treaties", said that he appreciated the adoption of the first chapter of the corresponding draft guidelines on first reading; they would fill in the gaps and remove any ambiguities of the 1969 Vienna Convention. Japan believed that the primary objective was to clarify the legal effects of the various unilateral declarations on treaties made by States; consequently, it was useful to define the different types of declaration only when they had a specific and distinct legal effect. He feared that the Commission had undertaken too extensive a project, in view of the large number of subcategories of interpretative declarations that it had identified. Inasmuch as interpretative declarations, whatever their form, did not purport to exclude or modify the legal effect of the provisions of a treaty, there was no need to subdivide them. It was to be hoped that the Commission would re-examine the first chapter when it returned to the question of legal effects.

16. **Mr. Hilger** (Germany) said that his delegation accepted the draft guidelines on reservations to treaties adopted on first reading by the Commission that appeared in chapter VI of its report. However, it should not be forgotten that the majority of real problems generated by the reservations and their consequences, including possible objections and interpretative declarations, did not involve the question of their definition. Germany hoped that once the draft first chapter on definitions had been completed, the Commission would concentrate on finding practical solutions to real-life problems in order to prepare guidelines that truly responded to the needs of practitioners.

17. As to the consequences of inadmissible reservations, it was not completely satisfactory, in the case of a reservation which was clearly excluded under article 19, to relegate them to a system of declarations and objections between parties to a multilateral treaty, as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties. To sever the prohibited reservation from the rest of an expression by a State of its consent to be bound by a treaty, considering only the reservation as null and void, would cause the State to be bound by provisions which it had expressly excluded from its consent and would contradict the very essence of treaty law. His delegation supported the Special Rapporteur's conclusion that it was always the exclusive responsibility of the State itself to rectify the defect in the expression of its consent. The State had various options: withdrawing the inadmissible reservation, amending it along lines compatible with the object and purpose of the treaty, or refraining from becoming a party to the treaty.

18. Still, the fact remained that the clarification of the incompatibility of a reservation with the object and purpose of a multilateral treaty and its ensuing consequences must be objective. The International Court of Justice had, in fact, earlier stated in an opinion that where a State's reservation was not compatible with the object and purpose of a convention, that State could not be regarded as being a party to the convention.

19. That principle created uncommon difficulties when applied in practice, because in the absence of a body to decide the question of incompatibility, the matter was left in the hands of the States parties. Some States might object to the reservation and declare the ratification or accession null and void. Other objecting States might insist that the reserving State should be bound without limitation. Furthermore, the question arose as to whether, in the case of a reservation contrary to article 19 of the Vienna Convention on the law of treaties, States had to object at all to prevent it from becoming effective. His Government tended to think not, and State practice in the field differed widely. The uncertainty of the current regime with regard to the practical consequences of inadmissible reservations, itself stemming from the Vienna regime, urgently needed clarification.

20. Article 22 of the Vienna Convention provided that a reservation could be withdrawn at any time, and the same held true for partial withdrawals. There was no doubt that modifications of reservations were permitted if they constituted a mere partial withdrawal of a reservation. Problems arose, however, when the modification not only subtracted from the original reservation but also changed its character or scope by adding to it. The United Nations Treaty Section, apparently mindful of the neutral role of the Secretary-General as depositary, refrained from making legal and/or value judgements in such cases. Except in cases of mere partial withdrawals of original reservations, the Secretariat circulated the text of the modification to all States parties concerned and proposed that in the absence

of objections by any of them within 90 days of the date of circulation, the modified reservation should be accepted. The absence of objections was considered by the depositary as amounting to a tacit acceptance by all the States parties concerned.

21. In a case where only one State objected to the modification of a reservation within the 90-day period - which seemed rather short, especially when compared with the 12-month time limit under the Vienna Convention - the question arose as to whether the modification should be considered null and void with regard to all States parties. Such an approach would seem acceptable if the modification constituted an added or new reservation. If, however, the modification amounted to no more than a partial withdrawal of a reservation, which did not require acceptance by other States parties, the objection by only one State party should not be sufficient to block it. Yet the current practice of the Secretary-General as the principal depositary of multilateral treaties led to such consequences.

22. His delegation would welcome it if the Commission could find a solution to the problem, which could then be implemented by the United Nations Treaty Section and also be incorporated in an addition to the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/8).

23. **Ms. Hajjaji** (Tunisia), referring to chapter V of the report dealing with chapters III, IV and V of Part Two of the draft articles on State responsibility, said that the applicable law and the provisions fell essentially under international customary law. The Commission should give further thought to how the various chapters of Part Two hung together, because that could be the cause of a certain inconsistency and undesirable imbalance.

24. Chapter III, entitled "Breach of an international obligation", was the linchpin of all the provisions of the State responsibility regime. However, article 16 of chapter III, dealing with the existence of a breach of an international obligation, required closer study. The text ought, for instance, to take into account the possibility of a conflict of international obligations.

25. In that connection, and in keeping with the normative approach taken by the Vienna Convention on the law of treaties when it established, in articles 53 and 64, the precedence of the peremptory norms of *jus cogens*, her delegation believed the draft articles should contain a provision referring to the hierarchy of norms in international law, which presupposed a definition of *jus cogens* rules. One possibility, as the Commission had proposed, would be to include in chapter I a more general provision on peremptory norms, giving once again the definition in article 53 of the Vienna Convention. That would make it possible to establish a general link between the principle of *jus cogens* and the subject of State responsibility, especially since a number of provisions of the draft articles referred to it directly or indirectly.

26. Chapter IV of the draft articles, entitled "Implication of a State in the internationally wrongful act of another State", was in her delegation's view indispensable to the balance of the draft articles. However, it should be borne in mind that the specific characteristics of international complicity precluded the wholesale application to it of the relevant provisions established under national legal systems.

27. With regard to chapter V of the draft concerning "circumstances precluding wrongfulness", the Tunisian delegation agreed that such circumstances did not preclude the State's commitment to the obligation, since that obligation still existed and since the failure to conform which affected it was limited in time. It was therefore vital to precisely determine the causes exonerating from wrongfulness.

28. Article 29 in that chapter might allow misinterpretation of the excuse of consent. Similarly, with respect to the wording of the first paragraph of that article, which provided that "the consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent", the Tunisian delegation supported the opinion of the Special Rapporteur, namely that it raised a number of questions and, crucially, that it should be reformulated more clearly.

29. Turning to the topic of reservations to treaties, which was the subject of chapter VI of the ILC report, she stressed the importance attached to the distinction between and the definition of reservations, which involved taking account of the evolution of international law and State practice on the question. She supported the overall framework of the draft which retained the principle of the unity of the regime of reservations and was consistent with and complementary to the Vienna Conventions. She reiterated the importance of studying the issue of extensive reservations and shared the view of the Special Rapporteur that, in the case of a unilateral obligation assumed by the author which went beyond that imposed by the treaty, such an extension should not be considered a reservation.

30. **Ms. Hakkum** (New Zealand), referring to chapter IX concerning international liability for injurious consequences

arising out of acts not prohibited by international law, recalled that at the previous session her delegation had welcomed the adoption by the ILC on first reading of 17 draft articles on the subject. However, her delegation had been seriously concerned about the Commission's decision to separate the two key aspects of the topic into those relating to prevention and those relating to liability.

31. At its fifty-first session, the ILC had decided to suspend consideration of the question pending the second reading of the draft articles on prevention. New Zealand and many other countries would have preferred the Commission to have reconsidered its decision to split its study of those two aspects.

32. The topic had been included on the programme of the ILC since 1978. As delineated by the Commission, it focused on activities carried out within the territory, or under the control or jurisdiction of a State which involved a risk of causing, or actually caused, transboundary harm through their physical consequences. It stemmed from the recognition of a number of key factors and principles, namely: that human activities involving an intervention in the natural order would continue to be pushed to the limits of scientific and technological knowledge; that although the effects of such activities were often positive, they might have harmful consequences, some of which were unforeseeable; that, since the laws of nature did not enable such consequences to be confined within national borders, the recognized principles of international law and State practice provided guidance concerning the international legal framework which should govern them.

33. Prevention and liability formed a continuum beginning with the duty to assess the risks of significant transboundary harm and ending with the obligation to provide compensation if harm occurred. That continuum could be clearly seen from the draft articles submitted by the 1996 Working Group (A/51/10, pages 245 to 327).

34. In its future work, the ILC should maximize the freedom of States to conduct, within their territory or under their jurisdiction or control, activities which were not in themselves unlawful. Accordingly, the draft articles should specify the conditions under which such activities were permitted, even if they involved a risk of causing significant transboundary harm and even if such harm occurred - whether or not those activities had been defined as dangerous. For those conditions to be truly applicable, it was necessary to provide for cooperation between source States, affected States and international organizations, which would enable all appropriate measures to be taken to prevent or minimize the risk of harm. The precautionary principle was relevant in that regard; even if the existence of such a risk had not been established scientifically, preventive measures should be envisaged to avoid any serious or irreversible damage.

35. Moreover, conditions which would allow States the maximum freedom of action should provide for compensation for any harm which might occur despite the preventive measures, or in their absence if the harm had not been foreseeable. Those conditions should prevent affected States, or the international community, from insisting that the State of origin must prevent all possible harm or from prohibiting the activities in question.

36. The inclusion of a right to compensation or relief accorded with two principles: firstly, that States should not permit activities within their territory or under their jurisdiction or control without taking account of their full cost, not only to their own citizens, but also to other States; secondly, that victims in other States should on no account shoulder alone the losses resulting from such activities. If those principles were not followed, the State of origin might enjoy the benefits of such activities while burdening other States with their costs, which would be inefficient and inequitable.

37. The methods by which the State of origin provided compensation, and the factors to be considered in determining its need and extent, should reflect State practice. The draft articles should not impose application of a rule of strict liability to compensate losses resulting from transboundary harm, but should provide for an equitable sharing of costs of activities, as well as of their benefits.

38. The draft articles should require States which eventually became bound by them to assess the risk of their existing activities on an ongoing basis and, if necessary, to provide for the prevention of and compensation for any future transboundary harm. Any compensation or other relief for transboundary harm that had already occurred should be governed by the principles and rules of international law applying at the time when the loss occurred.

39. In conclusion, she recalled that principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration already called for cooperation to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of States to areas beyond their jurisdiction. The draft articles in the Commission's 1996 report showed that the concept of international liability could be accommodated in international law, which should set at rest the fears of States that had been opposed to its codification and development.

40. She urged all States to support further work by the Commission on all aspects of the topic and stressed the pragmatic advantages of a comprehensive framework convention dealing with both prevention and compensation or other forms of relief.

41. **Mr. Lavalle** (Guatemala), speaking on chapter VI of the report of the International Law Commission, on reservations to treaties, said that each provision of the draft Guide to Practice should be considered in the light of the draft as a whole.

42. The first chapter of the draft Guide was more than simply a catalogue of definitions, as guidelines 1.3.1 and 1.3.2 in particular showed. It would therefore be appropriate to replace the title of the chapter by the words "General provisions" or perhaps "Scope of this Guide".

43. There was also a lack of coordination between guidelines 1.1 and 1.1.1. The latter presented a complete definition of the object of reservations, while the former did not. Guideline 1.1 did not mention "across-the-board reservations" and it might be useful in that guideline to replace the text after "purports to" by "achieve one of the objectives specified in guideline 1.1.1".

44. With regard to draft guideline 1.1.2, the Commission did not explain its reasons for amending the text which appeared in paragraph 540 of its 1998 report (A/53/10); the earlier wording had been much clearer. Moreover, draft guidelines 1.1.5 and 1.1.6 used the words "at the time when" and "when" rather than "in instances, in which".

45. It was cause for concern that draft guideline 1.1.5, which stated the obvious, made the draft Guide more difficult to understand, for the reader had the impression that the draft was introducing another concept in addition to those spelled out in draft guidelines 1.1 and 1.1.1, which was not the case. Furthermore, there was no reason to introduce into guideline 1.1.5 a reference to the appropriate time to make a statement. If the statement in question constituted a reservation, then draft guideline 1.1.2 would apply. To correct those anomalies, draft guideline 1.1.5 should be deleted and the following sentence should be added to draft guideline 1.1.1: "Such modification may consist, *inter alia*, in limiting the obligations imposed by the treaty on the State or on the international organization which formulates the reservation".

46. In draft guideline 1.1.6, the phrase "when that State or that organization expresses its consent to be bound by a treaty" should be deleted. Since that guideline stipulated that the statements to which it referred constituted reservations, the statements in question clearly came under draft guideline 1.1.2.

47. The title of draft guideline 1.6 also seemed too restrictive, as did its content, given that the first chapter of the draft Guide did not deal only with definitions. It could be amended to read:

> "1.6 Scope of the guidelines in this chapter
>
> The guidelines in the present chapter are understood to be without prejudice to the permissibility and effects, under the rules applicable to them, of the statements referred to therein."

48. Lastly, in draft guideline 1.2, the use of the word "attributed" in the fourth line might give the impression that the submission of an interpretative declaration was left to the discretion of States and that the declarant did not need to be convinced that its interpretation was correct. It was true that, in such case, the declarant would be acting in bad faith, which was contrary to law, but an unscrupulous State or international organization might interpret the word literally in order to defend a position that it was not sure was valid. To limit that risk, the wording after "scope" could perhaps be replaced by the following: "which, in the opinion of that State or that international organization, are those of the treaty or of certain of its provisions".

49. In conclusion, his delegation endorsed fully the comments made by the representative of New Zealand.

50. **Ms. Alajbeg** (Croatia), referring to chapter VI of the Commission's report on reservations to treaties, said that the approach taken by the Committee of Legal Advisers of the Council of Europe in the area of reservations which was focused on the preparation of model statements might be suitable for the work of the Commission. Such models could usefully replenish the existing structure consisting of guidelines with commentaries. The future Guide to Practice thus structured, would safeguard legal security and predictability in international relations.

51. Croatia fully supported the baselines on which the Special Rapporteur had built his approach, namely, the Vienna Conventions since their regime for reservations had proved efficient in practice and should not be changed. However, that regime did not provide clear answers to all questions, especially with respect to interpretative declarations. The Commission's work on such declarations, and on their effects, specificity and relationship to reservations, was particularly important and the draft guidelines relating to them were therefore welcome.

52. Her delegation wished to raise the problem of new States which, like Croatia, had arisen from the disintegration

of a predecessor State. At the moment of dissolution, such States had generally assumed the treaty obligations of the predecessor State. In the case of the former Socialist Federal Republic of Yugoslavia, the successor States, notwithstanding the generally recognized continuity of international obligations, had formalized that continuity through notifications of succession in respect of individual treaties. That course of action, however, had proved to have some limitations. A successor State was forced, within a limited period of time to give formal notice of succession to an entire body of treaties to which the predecessor State had been committed, in order to avoid a legal vacuum. However, at that moment, it was often impossible to predict all the implications which succession would have for the implementation of a particular treaty at the national level.

53. In view of the foregoing, her delegation regarded interpretative declarations, as defined by the Special Rapporteur in the draft guidelines and commentaries, as an important instrument for the interpretation and any adjustment of treaty obligations of successor States. The fact that such declarations, unlike reservations, were not strictly linked to the moment when the successor State gave its consent to be bound by a treaty made them a suitable means by which a State, according to the tendencies shown in practice, could give its own interpretation or explanation of the scope or meaning of certain provisions of a treaty or of a treaty as a whole. Such flexibility should allow those States which had taken on the responsibility of their predecessors to examine and interpret the rights and obligations arising from the treaty in question.

54. **Ms. Fernández de Gurmendi** (Argentina), referring to the subject of international liability for injurious consequences arising out of acts not prohibited by international law, which was dealt with in chapter IX of the report under consideration, said that the draft articles on the prevention of transboundary damage approved by the International Law Commission in first reading managed to balance the interests of States which had dangerous activities and those of States which could be affected by them.

55. The work of the Commission should not, however, be limited only to the question of prevention. It would be unfortunate to postpone *sine die* a question as important as the conceptual analysis of the subject and the formulation of rules which would be applicable to it. The violation of the obligation of prevention certainly involved international liability for a wrongful act, but the consequences thereof should also be analysed when there was significant transboundary damage, even when the State of origin of the damage had taken every precautionary measure. Since in such cases the obligation to make reparation was of a special nature, the rules concerning it should comply with certain special principles and supplement the principles relating to responsibility for an unlawful act, for example, the fact that a State had complied with the due diligence requirement did not exonerate it from liability, or the existence of limits to the reparation payable.

56. It would be a contradiction, after having posed the general obligation to prevent transboundary damage and attenuate the risks, not to provide for the consequences arising from any actual damage. It should be remembered that the national legislation of most countries established regimes of absolute liability for the cases covered by the draft articles, in other words for acts which were lawful but dangerous, which were tolerated because they had beneficial effects for society as a whole, even if they could in fact cause damage to private persons. It would also be a contradiction if the damage or risks to which people, material goods or the environment of other countries were exposed were dealt with in the same manner only when they affected the citizens of the country itself. In that connection, her delegation noted that the Commission had so far excluded from the scope of application of its draft articles spaces which were not under any jurisdiction and which were very important for the international community, such as, for example, the high seas. It therefore suggested that the Commission should consider drafting rules dealing with the prevention of damage in such spaces.

57. The Commission asked how it should continue to deal with the subject. Her delegation was prepared to accept that the question of liability for damage should be dealt with after the second reading of the draft articles on prevention. Those articles in fact took up in a general way the practice and case law which existed on the matter and had received general approval. It should not be very difficult to complete the draft articles.

58. Lastly with regard to that chapter, she explained her country's position with regard to the form which the draft articles being worked on should take. Her delegation would hope that the final instrument would be a convention which was general in scope, but it was prepared initially to be satisfied with a series of guidelines, combined in a declaration to guide States which had to conclude bilateral or regional treaties. Having said that, it seemed to her that it was important to avoid overusing too liberal regimes, so-called soft law, which, as the recent trend had shown, reduced to a minimum the effects of that type of instrument. Perhaps that might be seen as a deliberate intention not to go further and to oppose the development and codification of new standards.

59. Turning to the subject of unilateral acts of States (chap.VIII of the report), she said that there was undoubtedly a question whether unilateral acts were or were not a source of international law in the sense of article 38 of the Statute of the International Court of Justice, but it was evident that they could engender international rights and obligations for States. There were four types of unilateral acts: a promise, a waiver, a recognition and a protest, each of which had its own characteristics which the Commission would have to identify and analyse. It would also have to proceed to a detailed study of the case law of the International Court of Justice, which had applied and systematized the existing principles on the subject in a number of its judgments.

60. In paragraph 594 of the report, the International Law Commission posed a number of questions. The first was who had the capacity to carry out a unilateral act on behalf of a State. It was clear that the acts of the Head of State, the head of the Government and the Minister for Foreign Affairs could always be attributed to the State. That international rule was now fully recognized and its importance was fundamental. Since the contemporary world was characterized by the multiplication of communications and relations between institutions and by acts carried out outside the country by agents of the State, it was important to know precisely who could commit the State by a statement or a unilateral act. Moreover, the conclusion of a treaty, an instrument which involved rights and obligations, required the presentation of credentials signed by the Minister for Foreign Affairs unless it was concluded by one of the three aforementioned persons. It was easy to understand that an official, even one at the highest level, could not create international obligations for his State by carrying out a unilateral act. Anything one might want to add to that established rule of customary law would have to be considered from a restrictive angle. The only course was to seek to improve the formulation by taking contemporary international realities into account.

61. The second question dealt with the forms which unilateral acts should take. Neither the practice of States nor case law or doctrine required particular forms. The rule was that the expression of the will of the State should be known by the other States or other subjects of international law concerned.

62. The third question dealt with the possible contents of unilateral acts. Such acts should be intended to produce legal effects, to modify the legal situation of the State carrying out the act and, indirectly, that of the State or States affected by the act. In general, that effect consisted in creating or modifying an obligation or waiving a right under international law. But there were also unilateral acts the purpose of which was to define or clarify legal concepts, as was shown by the history and evolution of certain principles of the law of the sea.

63. Lastly, the International Law Commission inquired about the possible revocability of a unilateral act. In her delegation's view, once the author of a unilateral act had expressed its will, it could not at its own discretion either revise or revoke a promise, a waiver or the act in question. It could obviously subordinate the will thus expressed to the expiry of a time-limit or to the fulfilment of a condition, or state explicitly that it might one day countermand it. Some maintained that, while the possibility of revocation did not fall within the context of the act in question or its nature, a promise or a waiver were in principle irrevocable; others believed, on the contrary, that they were revocable, but not in an arbitrary manner or in bad faith. In any event, it was clear that the legal situation created by a unilateral act could not be immutable: it was subject to general rules such as the principle *rebus sic stantibus*, the exception of *force majeure*, and so on. One might add that certain unilateral acts, such as protest, were in general revocable.

64. Turning to the relationship between the law of treaties and that of unilateral acts, she said that, in her opinion, there were many points of intersection between treaty acts and unilateral acts. Both were legal acts and belonged to the same regime in terms of expression of will, invalidity, conditions of existence, etc. As a result, many of the provisions of the Vienna Convention could be transposed to unilateral acts, but the Commission should not do that automatically. For example, article 6 proposed by the Special Rapporteur was entitled "Expression of consent", a term which did not convey very clearly what was intentional about the act.

65. Nevertheless, there was one area where the rules of the law of treaties and the rules applicable to unilateral acts were of necessity divergent, and that was the area of the interpretation of unilateral acts. As the International Court of Justice had stated in the *Nuclear Tests* cases, the declaration by which a State limited its freedom of action must be interpreted strictly. That was simply a corollary of the celebrated *dictum* of the Permanent Court of International Justice in the *Lotus* case. As with any unilateral legal act, the intention of the author played a fundamental role. It was for precisely that reason that the determining factor constituted by the circumstances of the act, in other words, the context in which the act was carried out, must not be overlooked. Moreover in the *Anglo-Iranian Oil Co.* case, the Court had laid down the rule that the act must be interpreted in such a way that it produced effects that were

in conformity with existing law and not in contradiction to it.

66. In conclusion, the Commission should not limit its analysis to a single category of unilateral acts, such as declarations, but should try to cover all categories. She recalled that the Commission was at the same time studying the major issue of reservations to treaties. Since a reservation was a kind of unilateral act, it would be prudent to ensure coherence between the two drafts.

67. **Mr. Hakapää** (Finland), speaking on behalf of the Nordic countries, said that the topic of unilateral acts of States (chap. VIII of the Commission's report) was no doubt a challenging one for the Commission. There were numberless instances where such acts were a means of conducting day-to-day diplomacy, and they were also the prerogative of sovereign States. On the other hand, it was very difficult to regulate such acts in all their forms. It was obviously acts with legal consequences upon which consideration of the topic should focus. Even so, it was not always easy to distinguish a "legal" act from a "political" act, and that did not facilitate the current exercise.

68. In general terms, the Nordic countries agreed with the concept elaborated by the Working Group as the basic focus for the Commission's study on the topic, as set out in paragraph 589 of the report. In principle, they took the view that the scope of the study should be sufficiently wide and that it should deal with unilateral statements without limiting itself to what the report called autonomous acts not having any other basis in international law. In fact, the Commission's exclusion of unilateral acts subject to special treaty regimes was somewhat questionable, since such acts usually involved practical situations that were in particular need of analysis. With regard to declarations accepting the jurisdiction of the International Court of Justice, however, that exclusion was understandable since it was for the Court itself to decide on its own competence.

69. The Nordic countries concurred with the Commission's suggestion that its focus should be on a unilateral statement made by a State with the intention of producing legal effects in its relations with one or more other States or international organizations. The statement must be made by the competent authorities of the State concerned and must be adequately notified or otherwise made known to the other States or international organizations; that definition should include not only formal declarations but also other types of statements such as promises or waivers of rights and privileges.

70. In practical terms, however, one might question whether such a broad mandate could be assumed from the outset. One alternative that might facilitate expeditious results would be to proceed on a step-by-step basis, starting with statements which created obligations rather than those which were aimed at acquiring or maintaining rights. The scope of the study could be expanded later to include the latter category of statements, taking into account the results of the work on the former.

71. In some cases, also, it seemed that a study of unilateral acts impinged on other, more substantive regimes of international law. For instance, recognition of States might take place by unilateral action, but the conditions and legal ramifications of recognition constituted a celebrated issue of international law which could not be addressed solely with a reference to its mode of action. One might wonder whether such a case should be included in a study of unilateral acts or would be better considered on its own terms as a distinct regime. Similarly, reservations to treaties should be excluded from the scope of the study, since they already appeared as a separate topic on the Commission's agenda.

72. The Nordic countries considered the question of the applicability of treaty law to unilateral statements to be highly relevant. The Special Rapporteur had suggested that many of the provisions of the Vienna Convention could *mutatis mutandis* be applied to such statements, but the differences between the two regimes should not be overlooked. The law of treaties was governed by the principle of *pacta sunt servanda*, which was not to be found at the core of unilateral acts. The Vienna Convention might offer useful guidance in that context, but it could not simply be transformed to apply also to unilateral acts. In fact, the question arose of whether there was a need, or an actual possibility, for detailed regulation of the vast field of unilateral action. The Nordic countries had some doubts about embarking on a project similar to that of the law of treaties in that field. However, it might be useful in general terms to define unilateral acts having legal effects in international law and, in particular, how the principle of good faith should be reflected in the determination of the legal effects of such acts.

73. The Nordic countries noted the questionnaire which the Secretariat had recently distributed to Governments requesting information about their practice in the area of unilateral acts and their position on certain aspects of the Commission's study of the topic. It was to be hoped that the questionnaire would meet with the widest possible response, but Governments might find it difficult to provide all the information requested, as the concept of a unilateral act might be as undefined at the national level as it was at the international level. On the other hand, the response to the

questionnaire should reveal the extent to which the topic actually corresponded to a practical need felt by Governments, since it seemed that the Commission had been entrusted with a task that was perhaps more complex than originally foreseen.

74. **Mr. Keinan** (Israel), referring to paragraph 30 of chapter III of the report, concerning the Commission's questionnaire on reservations to treaties, said that Israel had replied to the questionnaire in 1996 and considered that the cooperation of those States which had not yet responded was essential to the discussion of the topic.

75. Turning to chapter VI of the report, on reservations to treaties, he said that the issue of conditional interpretative declarations covered by draft guideline 1.2.1 was especially relevant in view of the abundance of new treaties prohibiting reservations. His delegation agreed with those members of the Commission who distinguished between conditional interpretative declarations and reservations. The distinction lay not only in the purpose which each was meant to achieve but also in the special nature of conditional interpretative declarations, which did not apply automatically and took effect only if and when the condition in question was fulfilled. His delegation therefore believed that such declarations should not be treated purely and simply as reservations, especially prior to the fulfilment of the condition.

76. Other aspects would have to be clarified if guideline 1.2.1 was to be capable of application, especially with regard to the possible consequences of such declarations: for example, must the declaring State be regarded as a party to a treaty from the standpoint of the number of ratifications required for its entry into force? Who decided that the condition had been met, and when? How were the other parties informed about the status of the declaring party vis-à-vis the treaty?

77. The issue raised by guideline 1.4.3, on statements of non-recognition, was so complicated, especially with respect to the possible legal effects, that the guideline should be removed from the draft Guide. The same could be said of guidelines 1.5, 1.5.1 and 1.5.2, for the practice in the matter was virtually non-existent.

78. **Mr. Dufek** (Czech Republic) said that the main purpose of the Guide was to make a clear distinction between reservations and interpretative declarations. That distinction had remained blurred until now because the practice of States was inconsistent but also because of terminological uncertainties in the law of treaties.

79. At the fifty-third session his delegation had mentioned some difficulties raised by the wording of the draft definition of reservation, which seemed in some parts too vague and did not provide a reliable criterion of the distinction between a reservation and an interpretative declaration. It was therefore pleased to note the results of the Commission's deliberations and drafting work at its most recent session. The current wording of the definitions of reservation and interpretative declaration were satisfactory and represented a good basis for drafting secondary rules.

80. His delegation also supported the inclusion of the cluster of guidelines dealing with the method of applying of the distinction between reservations and interpretative declarations, for it might prove very useful. As the Commission stated in the commentary, the general rule was set out in guideline 1.3.1 and the two other guidelines supplemented that rule. His delegation supported such a categorization but thought that the distinction between a general rule and a supplementary rule should also be emphasized in the text of the guidelines themselves.

81. The commentary to guideline 1.2.1, on conditional interpretative declarations, contained convincing arguments in support of that kind of declaration. Although in fact such unilateral declarations of that kind were close to reservations in terms of their legal effects, and although some members of the Commission had recommended that they should be treated as reservations, his delegation supported the Commission's final decision to include them among interpretative declarations. The Commission had also been wise to reconsider its approach to statements of non-recognition and to retain the idea expressed in guideline 1.4.3, i.e. that such statements could not be taken for reservations or interpretative declarations. Unlike reservations, they did not concern the treaty itself but rather the capacity of the non-recognized entity to be bound by the treaty.

82. His delegation also shared the Commission's view concerning the application of reservations and interpretative declarations in connection with bilateral treaties. In the commentary the Commission had correctly explained that a "reservation" to a bilateral treaty did not have the same legal effects as one made to a multilateral treaty. Its conclusion - that in such cases a reservation was a proposal to amend or renegotiate the treaty in question - seemed to be the only possible one. However, unlike the Commission, his delegation thought that that conclusion should be reflected in guideline 1.5.1 itself. The current wording of the guideline was not sufficiently balanced by the commentary and could be misleading. It might be redrafted along the lines of guideline 1.4.2.

83. **Mr. Crook** (United States of America), commenting on chapter VI of the report, concerning reservations to treaties, said that the Commission's idea of drafting a Guide to the practice rather than a more rigid document had great merit. The Commission had also been wise to adopt on first reading the 18 draft guidelines and their commentaries, which were to constitute the first chapter of the envisaged Guide. The restructuring of the first chapter into six separate sections should facilitate the work of lawyers on the analysis and evaluation of reservations, declarations and interpretative declarations.

84. It was interesting to note that, in its presentation, the Guide differed from the three Vienna Conventions: the rules contained in those instruments constituted their important parts. The Commission's commentary might throw light on the meaning of particular articles of the Vienna Conventions, but States seldom referred to the commentary before citing an article of the Convention. The contrary might be true of the Commission's guidelines, for States might make more use of the commentary than of the guidelines themselves.

85. The Special Rapporteur and his colleagues on the Commission were to be congratulated on the wealth of their sources, which had been augmented by the replies of 22 Governments. Governments now had a comprehensive view of the practice of States in respect of reservations for the first time since the drafting of the Vienna Convention on the Law of Treaties more than 30 years ago. That overview would be a valuable resource for States when drafting the provisions of treaties relating to reservations, declarations and interpretative declarations, when they were considering the possibility of making reservations themselves, or when they had to decide whether to respond to the reservations or interpretative declarations of other States.

86. The definitions establishing separate categories of statement which might be made with respect to a treaty could shape the practice of States if States regarded the guidelines as authoritative. The United States had a practice of incorporating "understandings" in its instruments of ratification, i.e. interpretative statements designed to clarify or elaborate on rather than to change, the provisions of the agreement in question. Under the terms of guideline 1.4.4, which dealt with general policy statements, such "understandings" would not be covered by the Guide. In any event, the commentary to that guideline was not perhaps entirely clear, and the Commission might have to return to it on second reading.

87. His delegation thanked the Commission for having discussed under guideline 1.5 the question of the applicability of unilateral statements, including reservations, in the case of bilateral treaties. The United States Government had a highly developed practice in that area, but other States also made interpretative declarations in respect of bilateral treaties. It was useful in fact to include a provision on the subject in the Guide.

88. His delegation was pleased to note that, as indicated in paragraph 642 of its report, the Commission planned to take up the Special Rapporteur's sixth report, on the effects of reservations and interpretative declarations, at its fifty-third session.

89. **Mr. Chee Il-choung** (Republic of Korea), commenting on chapter V of the draft articles on State responsibility, said that his delegation was satisfied with the simplifications made by the Special Rapporteur. However, it would like to comment on some of the provisions.

90. With regard to article 30 (Countermeasures) it noted that if an act of an injured State was legitimate under international law the question of its wrongfulness clearly did not arise. There was therefore no justification for retaining article 30. But the Commission devoted a long commentary to that article, mentioning in particular sanctions and other kinds of reaction. If the Commission decided to retain draft article 30, it would have to rework the text and spell out what constituted a permissible countermeasure.

91. With respect to article 34 (Self-defence), his delegation wished to propose that its scope be expanded beyond the condition set by Article 51 of the Charter of the United Nations. Given the power of modern weaponry, States should be in a position to exercise their right of self-defence before being subjected to an attack which might destroy their military capacity. That was why his delegation proposed the insertion after "Charter of the United Nations" of the phrase "or other relevant rules of customary international law as appropriate".

92. Paragraph 3 of article 45 should be deleted in order to avoid a State committing a wrongful act being able to invoke the dignity of State as justification.

93. Paragraph 1 of article 48 imposed an obligation on the injured State to negotiate prior to taking counter-measures, which seemed unfair. It would be preferable to oblige the State committing the wrongful act to put an end to it as soon as the injured State requested it to do so. The obligation to negotiate should be incumbent upon the State committing the wrongful act.

94. Lastly, it should be stated in article 52 that the international crimes listed under article 19 should not be subject to a statute of limitations, which would bring it into line with the Convention on the Non-Applicability of

Statutory Limitations to War Crimes and Crimes against Humanity.

95. Turning to the Draft Guidelines on Reservations to Treaties, dealt with in chapter VI of the report, he said that the main problem was whether or not an interpretative declaration, and especially a conditional interpretative declaration, could be used as a reservation. It would be possible to remove the ambiguity by, for example, adding a sentence to guideline 1.2 reading: "Interpretative declaration does not add any rights and obligations to what has already been provided under the treaty."

96. Furthermore, conditional interpretative declarations should be classified as part of the regime applicable to reservations, since a State which had recourse to them subordinated its consent to a treaty by its own interpretation. Bringing conditional interpretative declarations under the regime applicable to reservations would avoid the difficulties that could arise when determining whether a conditional interpretative declaration must be considered as a reservation or as an interpretative declaration.

97. **Mr. Sun Goshun** (China) said that the draft guidelines on reservations to treaties were clear and exhaustive. However, there were a number of observations he would like to make on specific provisions.

98. Guideline 1.3 included key provisions of which the most important was guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited), because for a State the practice of formulating a unilateral statement when a treaty explicitly did not permit reservations created difficulties of both a theoretical and a practical nature.

99. Guideline 2.2.3 was based on the principle of good faith. As stated in the commentary, the presumption of good faith was not irrefutable. In fact, when a treaty prohibited in explicit terms any reservations, no reservation of substance was permissible, irrespective of the form in which the unilateral statement was expressed. It would therefore be necessary to have that element reflected in the text of the guideline in order to prevent any abuse.

100. As to guideline 1.2.1 (Conditional interpretative declarations), it was worth emphasizing that in legal terms such declarations were different in nature both from simple interpretative declarations and from reservations in the strict sense.

101. Guidelines 1.1.7 and 1.2.2 dealt respectively with reservations formulated jointly and interpretative declarations formulated jointly. The withdrawal of such declarations or reservations could be joint, unilateral or separate. It would therefore be useful to insert in the text of the draft provisions regarding the various different cases, as was done in article 22 of the Vienna Convention.

102. Finally, with regard to guideline 1.4 (Unilateral statements other than reservations and interpretative declarations), his delegation was of the view that it must be included in the draft because it enabled a more in-depth study to be undertaken and contributed to a better understanding of the subject.

103. *Ms. Halluar (New Zealand), Vice-Chairman, took the Chair.*

104. **Mr. Tankoano** (Niger), also speaking on the subject of the draft guidelines on reservations to treaties, said that like the delegation of France he preferred the term "Lignes directrices" to "Directives", which had a restrictive connotation.

105. As for the distinction between a reservation and an interpretative declaration, his delegation wished to point out that once it was acknowledged that there was a difference between the two concepts they could not be made subject to the same legal regime even if international practice showed that the gap separating them was a narrow one. Prudence was therefore the order of the day, and the International Law Commission should devote more in-depth consideration to the matter.

106. The treatment which the Commission had given to the issue of "reservations" to bilateral treaties met with his delegation's approval. A bilateral treaty was assumed to have been concluded and negotiated in good faith. Formulating reservations to a bilateral treaty therefore amounted to wishing to reopen the negotiations. Furthermore, neither the Vienna Convention of 1969 nor the 1978 Vienna Convention on State succession explicitly envisaged the case of reservations to bilateral treaties.

107. The issue of the validity of reservations was one of the greatest importance, as was shown by the large number of objections raised to reservations formulated by States parties to treaties. A constant policy of objection ran the risk of undermining the validity of certain reservations. It was therefore necessary to ensure that the criteria of that validity were clearly defined.

108. Finally, he welcomed the fact that the Commission had turned its attention to the question of reservations to human rights treaties. Niger had drawn its attention to the matter in 1997. Human rights treaties, which were not based on the principle of reciprocity, were beyond the jurisdiction of the Vienna regime. It was therefore advisable to fill that

legal vacuum by establishing a regime applicable to instruments of that kind.

109. *Mr. Mochochoko (Lesotho) resumed the Chair.*

110. **Mr. Ogonowski** (Poland), also speaking on chapter VI of the report, welcomed the fact that the International Law Commission had chosen the form of a guide to practice for setting out the principles applicable to reservations to treaties. It would be a useful complement to the Vienna regime, and care should be taken not to call that regime into question.

111. With regard to the definition of reservations, it was useful to distinguish between the various forms of unilateral statements and to assess their validity. His delegation welcomed the fact that guideline 1.1.1 (Object of reservations) stated that the guide also covered across-the-board reservations. In a concern for coherence, the phrase "the treaty as a whole with respect to certain specific aspects" should be added to the text of guideline 1.1 (Definitions of reservations).

112. It also seemed logical that guideline 1.1.2 should give the full list of instances in which reservations could be formulated. Consequently, a cross-reference to article 20 of the 1978 Vienna Convention should be added to the text, since notification of succession was a means of expressing consent to being bound by a treaty.

113. The temporal limitations referred to in guidelines 1.1.5 and 1.1.6 were absent from guidelines 1.1.3 and 1.1.4, and for the sake of consistency it would be preferable that they be omitted completely or included in the latter two provisions.

114. His delegation fully endorsed the Commission's definition of interpretative declarations and its underlying reasoning. It approved in particular the wording of guideline 1.4.5, which implied that some of the statements concerning modalities of implementation of a treaty at the internal level constituted reservations if they purported to affect the rights and obligations of the declaring State towards other contracting parties. In that context, it was worth mentioning that statements of that type had played an important role in enabling the implementation of treaties which were not binding at the internal level. In his delegation's view, the definition of reservations did not exclude statements intended to specify the legal effects of a treaty prior to its entry into force. The Commission should discuss that question further.

115. The Commission had concluded that statements of non-recognition constituted neither reservations nor interpretative declarations. While that was a welcome development, the Commission should address the legal effects of statements of non-recognition that excluded the application of a treaty between the declaring State and the non-recognized entity, if not under the topic of reservations then under the topic of unilateral acts of States in the context of recognition. A commentary in that respect by the Commission would be useful, for statements of non-recognition could have the same legal effect as reservations, making it all the more necessary to distinguish clearly between the two types of legal act.

116. The Commission had rightly deemed that unilateral statements in respect of bilateral treaties were not reservations but amounted to a proposal to modify the provisions of the treaty or reopen negotiations between the two States concerned. It had also considered it useful to include a guideline on interpretative declarations in respect of bilateral treaties, which Poland appreciated, being one of the States which had had occasion to resort to them: in 1997, for example, it had made an interpretative declaration on the provisions of the Concordat it had concluded with the Holy See in 1993.

117. On the subject of unilateral acts of States (chapter VIII), his delegation shared the concerns expressed by many members of the Commission regarding the second report on the topic, especially as to the definition of unilateral acts. That definition had to be elaborated very carefully. It seemed preferable to avoid using terms such as "legal", "unequivocal", "autonomous" and "notorious", which had to do with form rather than substance. To describe a unilateral act as "a unilateral statement by a State by which such State intends to produce legal effects in its relations with one or more States or international organizations and which is notified or otherwise made known to the State or organization concerned" offered a much better starting point for the discussion than the definition proposed in the second report. The verb "intends" could however be replaced by the verb "purports", in order to bring the wording into line with the definition of reservations, which themselves were unilateral acts.

118. As regarded the distinction between formal and material acts, his delegation believed that a unilateral act and a declaration were not synonymous and it would be preferable to use the term "act", since it was more general. However, it agreed with the Special Rapporteur that for the time being the Commission should focus on declarations as formal law-making acts. The rules applicable to a unilateral act would be homogeneous, but they should in any case be applicable to all unilateral acts regardless of their content.

119. There was a parallel between the rules of the law of treaties and those of the law of unilateral acts. It would therefore be appropriate for the draft articles on unilateral acts to follow more closely the corresponding rules of the Vienna Convention on the law of treaties, especially with regard to the competence to bind the State and the validity of the expression of consent. For instance, the rule set out in draft article 4, paragraph 3, proposed by the Special Rapporteur, was too broad, since under the law of treaties the capacity of the heads of diplomatic missions was limited to acts producing legal effect exclusively vis-à-vis the State to which they were accredited.

120. Likewise, draft article 7 should follow more closely the corresponding provision in the Vienna Convention. Since the consent to be bound by a treaty and the consent to a unilateral commitment were both expressions of the will of a State, it seemed logical that the same reasons for invalidity should apply to both types of statements. There was thus no reason to omit the specific restrictions on the authority to express the consent of a State.

121. Paragraph 7 of draft article 7 should, furthermore, be modeled on article 46 of the Vienna Convention of 1969. The rule should apply not to all clear violations of a fundamental rule of internal law, but only to manifest violations of a rule of internal law of fundamental importance governing the competence to conclude treaties.

122. Lastly, there was the question of unilateral acts that violated a norm of general international law or a United Nations Security Council decision adopted under Chapter VII of the Charter. An act infringing general international law would not produce legal effects if it was not accepted by the addressee States. Thus the issue was one of legal effect rather than invalidity. The same held true for a unilateral act in violation of a Security Council resolution adopted under Chapter VII of the Charter. Since most resolutions had temporary effects, the issue could also be approached from the point of view of the suspension of the legal effects of a unilateral act.

123. **Mr. Roth** (Sweden), speaking on behalf of the Nordic countries, underscored the complexity of the topic in chapter IX of the Commission's report, entitled "International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)". It remained the view of the Nordic countries that any future international legal instrument should cover both the issue of prevention of transboundary harm and the duty to pay compensation for harm caused. The Commission had adopted in first reading 17 articles on prevention, and it should continue its work on the remainder of the draft articles without awaiting the completion of the second reading. It was time to focus on the notion of liability without having the complexity of the subject cause a delay in dealing with the question of effective compensation, which was an urgent one.

124. The Nordic countries had earlier commented on the draft text submitted by the Commission in 1996. Regarding the 17 articles already adopted, it should be stressed that not only was the notion of prevention relevant to activities involving risk, namely hazardous activities, but that it also came into play in relation to the containing and minimizing of the adverse effects arising from the normal conduct of hazardous activities and from accidents. It was therefore regrettable that article 1 (b) had been deleted from the draft articles on international liability, limiting the scope of the text to activities involving a risk of causing harm.

125. The Nordic countries were flexible as to the nature of the instrument to be adopted. One possibility could be a framework convention with some aspects of the topic dealt with in the form of guidelines or recommendations.

The meeting rose at 6.15 p.m.

United Nations A/C.6/54/SR.26

General Assembly
Fifty-fourth session

Official Records

Distr.: General
6 December 1999

Original: English

Sixth Committee

Summary record of the 26th meeting
Held at Headquarters, New York, on Thursday, 4 November 1999, at 10 a.m.

Chairman: Mr. Kawamura (Vice-Chairman) ..... (Japan)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82175 (E)

In the absence of Mr. Mochochoko (Lesotho), Mr. Kawamura (Japan), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Montesino** (Spain), referring to the topic of reservations to treaties, said that the very comprehensive and accurate work carried out should help States to resolve practical issues that had not been sufficiently covered by the Vienna Conventions on the Law of Treaties. His delegation commended the preparatory work done and hoped that future sessions would consider the validity of reservations and objections, which was a pressing concern in State practice.

2. In connection with the Special Rapporteur's fourth report (A/CN.4/491 and Add.1-6), he said he endorsed the correction accepted by the Rapporteur excluding statements of non-recognition from the concept of a "reservation". As had been clarified in the guidelines already adopted and in the Vienna Conventions, it was clear that the legal regime for reservations, and in particular objections, could not be applied to reservations relating to non-recognition. Guideline 1.3 had been provisionally adopted by the Commission on first reading, despite the lack of consensus on whether that type of reservation was appropriate to an act that purported to exclude or modify the legal effect of certain provisions of a treaty.

3. His delegation agreed with the definition of conditional interpretative declarations contained in guideline 1.2.1, on the understanding that the distinction between such declarations and reservations related only to the definition. As far as effects were concerned, conditional interpretative declarations should be governed by a legal regime similar to that governing reservations, which would include both the *ratione temporis* limitation and the possibility of formulating objections.

4. In relation to guideline 1.5.1, he said his delegation shared the view that a unilateral statement by which a State party to a bilateral treaty purported to obtain a modification of that treaty could not be considered a reservation. The title of the guideline should therefore be modified so as to be in keeping with the guideline's content.

5. In connection with the Commission's discussion of unilateral acts of States, his delegation was also somewhat baffled by the view that considering unilateral acts to be "autonomous" would reduce the topic's scope too much. It would be appropriate to apply that term to unilateral acts based on either treaty or customary law. There was a need for greater knowledge of State practice so that the study could go beyond the definition of a unilateral act as reformulated in paragraph 589 of the Commission's report (A/54/10 and Corr.1 and 2).

6. He welcomed the widening of the topic to include unilateral acts of States in relation to one or more international organizations. However, in view of the difficulties inherent in consideration of unilateral acts formulated by international organizations, that area should be considered separately at a later stage of the Commission's work.

7. His delegation was in favour of basing the legal regime for unilateral acts on the 1969 Convention on the Law of Treaties. As to the regime of safeguards for greater legal security, he noted that the requirement for publicity contained in the original definition had been deleted, as it did not apply to all cases. However, a definition was needed of the formality required for the act to be expressed and clearly known by the States or organizations to which it was addressed, in order to avoid problems of proof and controversy about the content.

8. A restrictive formulation was appropriate for the question of State representatives with the capacity to formulate unilateral acts. In that context, article 4, paragraph 3, should be deleted as it contradicted general State practice.

9. Finally, the issue of revocability of unilateral acts required clarification, and the effects of silence and acquiescence should also be studied.

10. In relation to international liability for injurious consequences arising out of acts not prohibited by international law, he said his delegation preferred the second of the three options proposed, namely that the Commission should defer consideration of international liability until it had completed the second reading on the regime of prevention. If the Commission did not make progress in defining the concept of due diligence, it would be difficult to make proposals relating to international liability. Issues relating to fulfilment of the obligation of due diligence should be dealt with separately from the draft text on prevention.

11. **Mr. Buhedma** (Libyan Arab Jamahiriya) said that the formulation of the draft articles contained in chapter IV of the Commission's report (A/54/10) on the nationality of natural persons in relation to the succession of States was very important as it would make a major contribution to the development and codification of international law and would assist in resolving the problem of statelessness. His

delegation noted that there was a balance in the draft articles between the rights of citizens and the interests of States: draft articles 1 and 4 recognized the right of every individual who had the nationality of the predecessor State to a nationality from the date of the succession of States and required States to take all measures to prevent persons from becoming stateless as a result of succession, whereas draft articles 8 and 9 specified limits on the obligation to attribute nationality.

12. His particularly wished to draw attention to the importance of article 12 on the unity of a family and article 15 on non-discrimination in relation to nationality. In the opinion of his delegation, the draft articles fulfilled their intended purpose and would apply to situations that occurred legally in accordance with international law but not to situations that were unlawful and violated the principles of international law, such as the occupation or annexation of territory by force.

13. His delegation endorsed the recommendation of the Commission to the General Assembly concerning the adoption, in the form of a declaration, of the draft articles on nationality of natural persons in relation to the succession of States.

14. Turning to chapter VI of the Commission's report he said that his country did not distinguish between the treaties to which it had acceded because they all entailed treaty obligations. His delegation supported the approach adopted by the Vienna Conventions on the law of treaties concerning reservations which affirmed, on the one hand, the sovereign right of States to formulate reservations and, on the other, the principle that reservations to a treaty must not be incompatible with its object and purpose.

15. In connection with chapter VIII of the report, his delegation emphasized the importance of the subject of unilateral acts and the need for the codification and progressive development of that topic. The second report of the Special Rapporteur clearly identified the main issues to be addressed, although there were a number of relevant matters that were not dealt with in the draft. Since the purpose of the draft articles contained in the second report of the Special Rapporteur was to serve as a basis for discussion, his delegation considered that it would be useful to seek the views of Governments and for the Commission to prepare a questionnaire requesting materials concerning their practice in the area of unilateral acts.

16. On the subject of chapter IX, concerning international liability for injurious consequences arising out of acts not prohibited by international law, he said that, in the event of any injury, the State responsible should be obliged to compensate the State that had suffered the injury.

17. His delegation supported the second option offered by the Special Rapporteur, namely to suspend the work on international liability until the Commission had finalized its second reading of the draft articles on the regime of prevention.

18. **Mr. Vaidik** (India) said that he agreed with Commission members who felt that the scope of the Commission's consideration of unilateral acts of States should be sufficiently flexible to include the concept of estoppel. The distinction between political and legal unilateral acts should be based on the authors' intention to produce legal effects. He cautioned against excessive reliance on either the law of treaties or the autonomy of the acts, and suggested examining the effect of unilateral acts in relation to a pre-existing treaty or customary norm as well. The range of persons formulating unilateral acts giving rise to rights or obligations under international law appeared to be wider than that of persons empowered to conclude treaties under the 1969 Vienna Convention on the Law of Treaties. He noted that articles 5, 6 and 7 were controversial insofar as they relied on the 1969 Vienna Convention on the Law of Treaties.

19. His delegation welcomed the initial progress made by the Working Group on Unilateral Acts of States with a view to examining the basic elements of a workable definition; the general guidelines to State practice; and the direction of future work on the topic. The work of the Commission would be facilitated by replies from Governments in response to a recently issued questionnaire.

20. Concerning international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation agreed that the Commission should consider international liability on completion of its work on the regime of prevention; it should also consider developments taking place in various other sectors related to the topic. He welcomed the progress achieved in the area of reservations to treaties and accepted the draft guidelines on that topic, which would be useful in the process of international law-making in general and to the legal offices of foreign ministries in particular. Since the guidelines were not intended to revise the reservations regime contained in the Vienna Convention on the Law of Treaties, they were not likely to be problematic from a policy and political point of view.

21. **Mr. Alabrune** (France) said that although unilateral acts of international organizations should be excluded from

the study on unilateral acts, they could be the subject of a special review by the Commission at a later date.

22. If, however, unilateral acts of States which gave rise to obligations for States were excluded from the topic's scope, there was a risk of excluding all unilateral acts, as they were almost all, in certain circumstances, likely to involve State obligations. The conditions for engaging State responsibility by a unilateral act could appropriately be excluded as the Commission was working on State responsibility as a separate topic.

23. It was often difficult to determine whether an act formulated by a State was of a legal or a political nature. Most often, international courts would assess the consequences of the act in question after determining the intentions of the State author of the act. Such was the explanation of the International Court of Justice in the *Nuclear Tests* cases, which had also stated that the subject should apply to unilateral acts which purported to, or were likely to, have legal effects at the international level.

24. Article 1 stated that the draft articles applied to unilateral legal acts formulated by States which had international effects. The word "legal" should be deleted, so as not to exclude political acts which could have legal effects. That comment also applied to draft article 3.

25. The provision for acts with legal effects took no account of the intention of the author and focused only on the consequences of the act. However, the intention of the author State was as essential an element as the legal consequences for defining the act. Establishing the intention of the author would often show whether the act was political or legal in nature.

26. With regard to legal effects of a unilateral act, he said the role of the addressee was also important. The addressee might sometimes reject the legal effects for political reasons, for example in order to oblige the author State to enter into negotiations, whereas the author State sometimes wished to avoid entering into negotiations. Consideration should be given to whether the addressee could reject legal effects intended to be in its favour.

27. The wording of the definition of unilateral legal acts in draft article 2 gave rise to some difficulties. Rules of international law applicable to unilateral acts of States could not be elaborated if there was no clear definition of those acts. The objective of codification should be to bring the different kinds of unilateral acts together in a system of rules that would apply to all of them. A reference to unilateral declarations alone would be too restrictive an approach.

28. The word "autonomous" also gave rise to difficulties. A unilateral act, to be defined as such, had to have autonomous legal effects, which meant legal effects independent of any manifestation of will on the part of another subject of international law. The autonomy of obligation created by a unilateral act was an important criterion in determining the purely unilateral nature of the act.

29. If an autonomous unilateral act was an act that created legal effects on the international level without any link with a pre-existing customary or treaty norm, the topic would lose a great part of its interest. It was appropriate to exclude unilateral acts based on treaty law, but unilateral acts that could contribute to the implementation of existing norms did come within the topic's purview.

30. The word "publicly" in article 2 seemed inappropriate, as a unilateral act did not necessarily have to be formulated publicly, although the addressee would need to be aware of it. It also seemed inaccurate to say that the State formulated an act in order to acquire international legal obligations, as unilateral acts could also be a means of acquiring or maintaining rights. Use of the term "legal effects" would be an improvement.

31. Draft article 4, particularly paragraph 3, also raised a few difficulties, and State practice in that area should be reviewed.

32. Draft articles 5, 6 and 7 followed the provisions of the 1969 Vienna Convention on the Law of Treaties too closely. Generally speaking, the process of taking rules from the Vienna Convention which applied to treaty acts and applying them to unilateral acts appeared somewhat risky. Again, State practice should be considered.

33. In relation to all of the draft articles, the Working Group on Unilateral Acts of States should pay close attention to the practice of States, whether author States or addressees of unilateral acts. France was ready to assist the Commission by providing information on current French practice in relation to unilateral acts.

34. Referring to the Commission's long-term programme of work, his delegation was unsure whether some of the topics identified by the relevant working group (for example, the right to collective security, and the risk of fragmentation of international law) were relevant to the Commission's task of codification and progressive development of international law.

35. It was essential that the topics to be studied by the Commission should meet the desires and needs of Member States. The Commission could usefully undertake a separate

study on the regime of countermeasures, instead of dealing with that topic in its draft articles on State responsibility. It would be useful for the Commission to consider the decisions adopted by international organizations, particularly their legal effects, especially as it did not wish to deal with unilateral acts of international organizations before completing its work on unilateral acts of States.

36. Two of the topics identified by the Working Group on the long-term programme of work should be studied by the Commission: responsibility of international organizations and the effect of armed conflict on treaties. Those topics should be added to the draft resolution prepared by the Colombian delegation on the Commission's report. However, it would not be useful to deal with environmental law, except to define a specific aspect that was problematic. A topic such as legal aspects of corruption and related practices was also inappropriate. Those two topics were a subject for international negotiation rather than codification.

37. **Ms. Kalthum** (Malaysia), after noting that the task of the reconvened Working Group on Unilateral Acts of States had been to agree on the basic elements of a workable definition of unilateral acts, to set general guidelines and to point the future direction of the Special Rapporteur's work, said that she regretted that the Special Rapporteur's report (A/CN.4/500 and Add.1) did not deal with unilateral acts of States in the form of the unilateral enactment of domestic laws having extraterritorial effects on other States and in turn affecting other forms of international relationships, including commercial and financial ones, whether with third States or their nationals. As such unilateral acts affected not only international relationships but also the equally binding international obligations of States under the relevant treaties, such as the various international agreements under the auspices of the World Trade Organization, the scope of the Special Rapporteur's work should not have been limited to studying the subject within the framework of the 1969 Vienna Convention on the Law of Treaties. The Working Group had, however, made salient comments on the Special Rapporteur's report, finding his interpretation of what constituted unilateral acts of States rather restrictive. It had then recommended a broader concept, which appeared in paragraph 589 of the Commission's report. Even that recommendation fell far short of the concerns of her delegation, which therefore urged the Commission to expand the scope of the definition of unilateral acts to include both acts of enactment of domestic legislation which had direct and/or indirect extraterritorial application to other States or nationals of other States and the recourse to unilateral use of force by a State on nationals of other States within the territory of other States in furtherance of the enforcement of domestic legislation. In that context, her delegation also noted that a unilateral act could be formulated by one or more States jointly or in concert. Her delegation would be replying to the questionnaire that had recently been distributed to members of the Sixth Committee on the topic.

38. Her delegation would also welcome a study of State responsibility in the light of the research to be done on the aspects of unilateral acts to which she had just referred and in the light of the provisions of Article 2, paragraph 4, of the Charter of the United Nations. A study of the two topics, together with recommendations, would serve at least as a useful guide to States in their dealings with each other. It should also mean that the rule of international law in that sphere would not be ignored nor given scant respect.

39. **Mr. Traore** (Burkina Faso) said that it was highly significant that the Commission's work on nationality related only to the succession of States. The narrow scope of the topic justified the Commission's work in an area generally considered to be solely within the jurisdiction of each sovereign State. It also justified the Commission's choice of habitual residence as the primary criterion for determining the nationality of individuals, a presumption that would not necessarily be made outside the context of a succession of States. His delegation supported the Commission's choice because it considerably reduced the risks of statelessness; better that a State should have a few extra nationals than that an individual should be left without nationality, without citizenship, without rights, without legal existence.

40. The issue of immunities was fundamental to good international relations. A balance must be struck between diplomatic protection and the rights of the States and its ordinary citizens. The courts of Burkina Faso consistently refused to hear proceedings against persons covered by immunity in order to preserve good relations with other States. On the other hand, immunity should not permit a natural or legal person to ignore civil obligations. His delegation hoped that the work under way would bring greater equity and justice to the system of immunities.

41. In the view of his delegation the concept of responsibility attached to all acts of a State, regardless of whether they were wrongful or not. The draft resolution currently being considered in the Committee on assistance to third States affected by the application of sanctions implicitly recognized the responsibility of the international community for the injury suffered in such case by a State without there having been a wrongful act. Conceptually, the problem was related to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. On that topic the Commission had

concentrated its efforts to date on a subject of particular importance to his country, the issue of prevention of transboundary damage from hazardous activities. Disparities in level of development were so great that the acts of some countries, although not prohibited under current international law, could be disastrous for others. In that area, the law was not concerned with whether an act was wrongful or not, but with whether there was a link of causality between the harm and the act. The responsibility in that case, that is, the liability, was to repair the harm suffered, whether the causative act was wrongful or not.

42. In the case of State responsibility for a wrongful act, his delegation supported the approach of identifying levels of seriousness; responsibility should be greater where was a breach of a *jus cogens* norm or an obligation *erga omnes*. The definition of "injured State" in article 40 should include two elements: the element of moral or material injury and the element of causality between the injury and the act. His delegation felt that the distinction between a State or States specifically injured by an internationally wrongful act and other States having a legal interest in the performance of the obligations was relevant. Articles 42 to 46 on reparation were well balanced. There was no reason to change the wording of article 44 to make it more specific with respect to the obligation to pay interest.

43. Articles 51 to 53 were out of place, because they focused primarily on distinguishing the wrongfulness of an act, whereas in the opinion of his delegation the question of responsibility was paramount. Chapter V on circumstances precluding wrongfulness needed to be reworded, because the circumstances cited precluded responsibility rather than wrongfulness.

44. His delegation felt that the draft articles should deal with the questions raised by the existence of a plurality of States involved in or injured by a breach of an international obligation. Linking countermeasures to compulsory arbitration was an unfortunate method of initiating dispute settlement procedures. His delegation was surprised that the Commission had not dealt with the issue of State responsibility in the case of reprisals out of proportion to the original breach.

45. As a weak State, Burkina Faso was subject to many forms of coercion, and it was not always possible to judge the lawfulness of the consequences. His country was well aware that many factors entered into responsibility for the commission of the act as between the coercing State and the coerced State. The key issue was to establish the existence of the coercion and the link between the effects and the act that created them.

46. On the topic of reservations to treaties, his delegation took the view that any reservation that called into question the substance of a treaty should be rejected. Use of reservations was common and indeed indispensable; however, they should not relate to *jus cogens* norms or obligations *erga omnes*.

47. **Mr. Szénázi** (Hungary) was pleased to note that, despite the complexity of the issues involved, progress had been achieved on the topic of unilateral acts of States. The Commission had laid down the groundwork necessary for keeping the size of the project within manageable boundaries. The streamlined scope should be maintained, since it would conduce to a timely completion of the study. His delegation endorsed the concept recommended by the Working Group, as it appeared in paragraph 589 of the Commission's report. The recently issued questionnaire would also serve as a good starting point for ascertaining State practice, enabling the Commission to revert to the seven draft articles formulated by the Special Rapporteur.

48. On chapter IX, relating to international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), he said his delegation preferred to comment at a later stage, when the Commission's views were known. It was regrettable that the Commission had been unable to consider the proposals contained in the Special Rapporteur's second report (A/CN.4/501), which enumerated a detailed set of principles relating to the obligation of due diligence and the treatment of international liability. He noted that the Commission had decided to defer consideration of the question of international liability pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities. His delegation took that decision to be a procedural one, aimed at facilitating further progress on the issue of prevention.

49. There was, nonetheless, an inherent interrelationship between the duty of States to exercise due diligence while discharging their obligations relating to prevention and, on the other hand, the question of liability if such obligations were not fulfilled. It was therefore a matter of particular concern that both the Special Rapporteur and the Chairman of the Commission had raised the possibility of terminating work on the topic of liability altogether. Such a decision would clearly hamper the full development and effectiveness of rules relating to prevention. Moreover, it could not be reconciled with Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration, which urged States to cooperate in developing further international law

regarding liability. The Commission should not lose sight of the original task of elaborating rules on liability.

50. **Mr. Rogachev** (Russian Federation), speaking on reservations to treaties (chapter VI of the report), said that the progress made on the topic was due to the fact that the Commission had adopted the balanced approach based on the status quo established by the 1969, 1978 and 1986 Vienna Conventions. That approach had proved its worth on both theoretical and practical grounds and had also passed the essential test of durability. It was therefore time to finalize the draft guidelines.

51. One of the main problems arising from the implementation of the relevant provisions of the Vienna Conventions was the need to distinguish between reservations and unilateral statements, which could appear to be reservations but were not. Such a distinction could obviously be drawn only if there were established and practical criteria making clear the difference between them. The Vienna Conventions were deficient in that respect, which meant that to determine the nature of a given unilateral statement its content had to be scrutinized. The complexity was increased by the fact that those making the statement wished to conceal their intentions. A possible approach to the difficulty would be to define unilateral statements which were near-reservations in terms of what they were not.

52. With regard to draft guideline 1.3.1, his delegation also supported the Commission's conclusions on supplementary means of interpretation, which should be used in cases where the interpretation of the statement in the light of the treaty to which it referred left the meaning ambiguous or obscure or would lead to a result which was manifestly unreasonable.

53. His delegation was less impressed with the second sentence of the draft guideline. The intention of the State formulating the statement was always reflected in the text of the statement and the way to interpret it was to use the rule in the first sentence. The second sentence was merely a more generalized statement of the principle contained in the first. His delegation therefore thought it useful to include in the draft guidelines recommendations on the use of supplementary means of interpretation, once the nature of unilateral statements had been resolved. His delegation believed that such supplementary means could include any other document, in addition to the treaty and the relevant unilateral statement, that established the intentions of the State formulating the statement. The occasions on which supplementary means should be used would have to be specified: perhaps they should be restricted to cases where the interpretation in terms of the first sentence of draft paragraph 1.3.1 left the meaning ambiguous or led to a manifestly unreasonable result.

54. One issue that was not sufficiently reflected in the Commission's report was that of declarations which were internally inconsistent, sometimes seeming to be a reservation and sometimes an interpretative declaration. Such declarations were not uncommon and it might be useful if the Commission considered the conditions under which the rules on reservations or interpretative declarations applied to such documents.

55. Given the practical orientation of the draft guidelines, the illustrative list of unilateral statements that could in certain circumstances be confused with reservations (draft guidelines 1.4-1.4.5) was useful. With regard to draft guidelines 1.5 to 1.5.3, his delegation endorsed the view that "reservations" to bilateral treaties were not reservations as understood in the Vienna Conventions. Such a "reservation" was tantamount to a proposal of negotiations to finalize the text of a treaty.

56. Ending with a few suggestions of an editorial nature, he said that the term "act of official confirmation" did not appear in article 11 of the Vienna Conventions; it would therefore be useful to provide a definition, perhaps as an explanatory footnote to draft guidelines 1.1 and 1.2.1. Secondly, since the overwhelming majority of reservations limited the obligations imposed on the party making the reservation, it seemed logical — on the principle of going from the general to the particular — to insert draft guideline 1.1.5 between draft guidelines 1.1.2 and 1.1.3.

57. Thirdly, it was hard to detect any real meaning in the phrase contained in draft guideline 1.1.6, requiring equivalence in the manner in which an obligation was discharged. That requirement would be redundant if the object of the provision was a specific result and not the way in which it was achieved. Draft guideline 1.6 stated that the definitions of unilateral statements were without prejudice to their permissibility under the rule applicable to them. Reference to the "equivalent" manner of discharging the provisions of a treaty, however, did call into question the statement's permissibility. Moreover, the notion of equivalence was rather indeterminate and could thereby complicate the implementation of draft guideline 1.1.6. The point of the draft guideline was to establish the principle whereby a unilateral statement aimed at changing the legal effect of provisions relating to the manner in which the treaty was discharged was a reservation. The words "but equivalent to" should therefore be deleted. The Russian text, too, was unsatisfactory.

58. **Mr. Varso** (Slovakia) said that his delegation supported all efforts to specify the scope of the application of reservations to treaties. It welcomed the progress the Commission had achieved thus far on the Guide to Practice, particularly the efforts of the Special Rapporteur. His delegation supported the Commission's conceptual approach to the structure of the draft guidelines and, in principle, their content as well, which was based on the relevant provisions of the Vienna Conventions of 1969, 1978 and 1986, as clearly illustrated by draft guideline 1.1.1. The scope of reservations or interpretative declarations, taking into account their phrasing and name, should be confined to the exclusion or modification of the legal effects of certain treaty provisions; the phrase "of specific aspects" would also restrict across-the-board reservations somewhat.

59. He stressed the practical nature of guideline 1.3.1 on the method of implementation of the distinction between reservations and interpretative declarations and guideline 1.4 on unilateral statements other than reservations and interpretative declarations. With regard to the latter, his delegation accepted the underlying philosophy of the distinction drawn in paragraph (1) of the commentary, which stated that interpretative declarations generally did not have as close a relationship with the treaty. Guideline 1.1.6 on statements purporting to discharge an obligation by equivalent means and guideline 1.3.3 on formulation of a unilateral statement when a reservation is prohibited seemed to add further elements to a treaty and should be subsumed under draft guideline 1.4.2. His delegation hoped that the Commission would also elaborate procedural guidelines on implementing reservations and interpretative declarations as defined.

60. The lack of a unified set of rules on the jurisdictional immunities of States and their property posed difficulties for some States, including Slovakia, particularly in the application of property immunities. His delegation supported the efforts of the Working Group on Jurisdictional Immunities of States and their Property and hoped that it would make further progress during the current session of the General Assembly. With regard to the "concept of State for purpose of immunity", his delegation agreed with the Commission that it would be desirable to bring the draft article into line with the draft on State responsibility, including with regard to federal States. In principle, international rights and obligations of a State as a subject of international law should also be applicable within the context of jurisdictional immunities.

61. Referring to the section on criteria for determining the commercial character of a contract or transaction, he said that the nature and purpose of the commercial transaction should be the starting point for consideration of its commercial character. He noted that, with regard to contracts of employment, the Working Group was attempting to maintain a balance between the interests of the employer State, which should be able to invoke immunity from jurisdiction if the contract of employment was directly related to the exercise of its sovereignty, and the State of the forum, which should have jurisdiction in almost every other case.

62. His delegation agreed with the Working Group that measures of constraint against State property required a more complex approach (A/54/10, annex, para. 118). The reasons and circumstances for bilateral measures of constraint against State property should always be taken into account and informed by the principle of universal justice. On that basis, a State's failure to fulfil its international obligations was an understandable ground for constraint; however, legislative measures against another State's property were not, unless the State of the forum provided just and adequate compensation. His delegation hoped that the Working Group would reconsider all aspects of measures of constraint in order to ensure that States were sufficiently protected in the courts of the forum State, and also to protect States which had acquired property legally and in good faith.

63. His delegation agreed with the Commission that it would be premature to draw final conclusions on the place of unilateral acts of States within the system of international law. It supported the Commission's decision to return to the starting point and analyse the components of the proposal set out in paragraph 589 of the report. The definition of unilateral statements in that paragraph and its components, namely, unilaterality, legal effects and notification, closely paralleled unilateral declarations within the framework of reservations to treaties. Indeed, it seemed that many of the rules applicable to treaty reservations could be applied *mutatis mutandis* to unilateral acts. The more important question of what distinguished a unilateral act from a reservation should be addressed within the framework of the obligations of States and all their consequences, including sanctions in the case of non-compliance. It must be determined whether the particularities of unilateral acts, with respect to both form and content, were so specific and numerous as to comprise a separate category of international law. For the time being, his delegation believed that they were not, and that unilateral acts should form part of international law on international obligations.

64. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said that the International Law Commission was to be commended on completing its work on nationality in relation to the succession of States in a reasonable period of time.

The draft articles struck the right note by reaffirming the principle that nationality was essentially governed by internal law within the limits set by international law. The articles had achieved an appropriate balance between the legitimate interests of States and of individuals and presented helpful guidelines on avoiding statelessness. Significantly, the Commission had excluded cases of occupation and illegal annexation of territory from the scope of the articles. The Commission's recommendation that the draft articles should be adopted by the General Assembly in the form of a declaration was a pragmatic approach. Although non-binding, the draft articles would immediately be available to States currently coping with problems of nationality in relation to a succession of States. His delegation would support the majority view on the method of adoption. Given the absence of interest from Member States in work on the nationality of legal persons, the topic could be considered concluded.

65. His delegation attached great importance to the Commission's work on jurisdictional immunities of States and their property. In recent years, a number of States had enacted national legislation restricting the immunity of States. Although the tendency was to exclude commercial activities from the scope of State immunity, State practice and legislation varied widely and in some cases went far beyond the emerging trend to undermine the very principle of State immunity. An international standard was therefore urgently needed, and the Sixth Committee should spare no effort to bring to fruition the endeavours of the Commission. A clear definition of "commercial transaction" for the purpose of State immunity was essential in order to avoid conflicting interpretations at the national level; the definition should include both nature and purpose criteria.

66. With regard to contracts of employment, his delegation felt that the clarification relating to article 11 proposed in paragraph 105 of the report of the Working Group contained in the annex to the Commission's report was a constructive approach. His delegation looked forward to the substantive discussions on the topic scheduled to take place in a few days by an open-ended Working Group of the Sixth Committee, but felt that three days might not be sufficient to finalize the draft articles and supported serious consideration of the matter at the next session of the General Assembly with a view to adopting the articles in the form of a convention.

67. In view of the lack of a legal regime encompassing all types of unilateral acts of States, developing relevant rules or guidelines in that field would enhance predictability in international relations. His delegation concurred with the majority view in the Commission that unilateral acts which gave rise to international responsibility were beyond the scope of the topic. Unilateral acts of international organizations should also be left aside for the time being. However, a study on estoppel would be useful, without prejudice to its possible inclusion. A survey of various types of unilateral acts of States and their classification was essential.

68. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation commended the Commission for its comprehensive examination of the issues of prevention and due diligence. It agreed with the Commission's decision to defer consideration of the question of international liability pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

69. On the subject of reservations to treaties, his delegation favoured the Commission's approach in preparing a Guide to practice, taking as a basis the general regime for reservations contained in the Vienna Conventions on the Law of Treaties, rather than developing a more formal instrument.

70. The Commission's recent practice in identifying issues to be addressed by Governments had undoubtedly contributed to a more focused debate within the Sixth Committee. It would be an ideal situation if the majority of States could prepare written replies to the queries of the Commission. However, experience had shown that a considerable number of States were not in a position to respond in writing. Under those circumstances, his delegation expected the Commission to pay due attention to the statements of delegations in the Sixth Committee.

71. His delegation would not object to a split session of the Commission in the year 2000 and agreed with the special organizational arrangements suggested in order to accommodate the split session within the existing budget. The International Law Seminar held every year in conjunction with the sessions of the Commission was invaluable for the dissemination of international law and should be continued.

72. Lastly, his delegation urged the Commission to make every effort to complete the second reading of the draft articles on State responsibility in the remainder of its current quinquennium. Substantive comments on that topic had been prepared by Professor John Djamchid Momtaz on behalf of the delegation of the Islamic Republic of Iran and would be transmitted to the Special Rapporteur and the members of the Commission.

73. **Mr. Jacovides** (Cyprus) said that the role of the Sixth Committee, as the political body in which all Member States were represented, was to provide clear guidance on specific issues, such as those mentioned by the Commission in chapter III of its report. He shared the view that the positions stated orally by Governments should be given no less weight than the written comments submitted by States in response to questionnaires. Small States, in particular, were necessarily limited in producing written comments on a wide variety of topics.

74. Turning to chapter IV of the report, he said that the selection of the topic of nationality in relation to the succession of States met a real need. His delegation noted with satisfaction that the *raison d'être* of the draft articles was the concern of the international community as to the resolution of nationality problems of natural persons in the case of a succession of States, and that, although nationality was essentially governed by national legislation, the competence of States could be exercised only within the limits set by international law. His delegation agreed that the fundamental concern was the protection of human rights and that the legitimate interests of both States and individuals should be taken into account. The key provision of article 1, based on article 15 of the Universal Declaration of Human Rights, was the right of everyone to a nationality. Another key provision in article 16, also based on the Declaration, was that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Traditional concepts of nationality law, such as the status of habitual residents (article 14) and the criterion of an effective link, were also taken into account (article 19).

75. His delegation noted, in particular, that article 3 explicitly limited the application of the draft articles to a succession of States occurring in conformity with international law. Accordingly, questions of nationality that might arise in situations of illegal occupation of territory, illegal annexation, or purported separation or secession contrary to existing treaties or other provisions of international law were outside the scope of the draft articles.

76. His delegation endorsed the Commission's recommendation that the text should be adopted by the General Assembly in the form of a declaration, while reserving the right to make specific comments at the time such action was taken. His delegation also shared the Commission's view that there was no need to deal with succession in relation to the nationality of legal persons and that the work of the Commission on the topic should be considered concluded.

77. With regard to jurisdictional immunities of States and their property (A/54/10, chap. VII), his delegation welcomed the report of the Working Group on the topic. The Working Group had concentrated on five main issues, identified in 1994, and had produced a valuable study, together with a short background paper attached as an appendix, dealing with the existence or non-existence of jurisdictional immunity in actions arising out of violations of *jus cogens* norms, particularly acts of a State in violation of human rights norms having the character of *jus cogens*. His delegation noted with interest the contents of the appendix, especially the two new developments, one concerning the amendment by the United States of its Foreign Sovereign Immunity Act through the Anti-Terrorism and Effective Death Penalty Act of 1996, and the other concerning the *Pinochet* case in the United Kingdom. His delegation noted and agreed with the view of the German delegation that the question was of enormous importance and was an essential part of the subject of jurisdictional immunity.

78. From the beginning of the consideration of the item in the Committee and the Commission, his delegation had favoured a pragmatic approach, avoiding differences between the theories of absolute and restrictive immunity, while aiming at a compromise on outstanding issues. State immunity was an important institution in international life; if a generally accepted convention could be achieved, that would indicate the time and efforts devoted to its realization. Realistically, however, the likelihood of reaching agreement in the near future was doubtful. Moreover, as the United Kingdom delegation had pointed out, the institutions of State immunity were bound up with the development of a modern system of trade and commerce, and to be successful, any attempted codification must correspond to modern conditions of international trade and cover adequately all issues that were likely to arise, including enforcement. The possibility of drawing up a model law offered a means of preserving what had been achieved while leaving room for practice to develop.

79. Chapter V of the report (State responsibility) raised fundamental issues. His delegation had consistently held that State responsibility had been transformed from the traditional approach of dealing primarily with injury to aliens to the current, much broader context, in which the interests of international public order and of the international community as a whole must be taken into account. Due weight must be given to the development of such notions as *jus cogens* and *erga omnes* obligations, as well as State practice. His delegation shared the confidence expressed by the Nordic countries that the second reading of the draft

articles would be completed within the term of office of the Commission's current members, in other words, by 2001.

80. Overall, his delegation concurred with the Special Rapporteur's approach. There was a practical reason for the distinction between a State and States specifically injured by an internationally wrongful act, and other States which had a legal interest in the performance of the relevant obligations but did not suffer economically quantifiable injury. While the legal interest existed for both categories of States, in the practice of States it was the specifically injured State that had the right to reparation. His delegation subscribed to the view that a wrongdoing State must provide compensation to the specifically injured State, including, in addition to the principal amount of pecuniary damage, interest and loss of profit. With regard to the question of a plurality of States involved in a breach of an international obligation, his delegation preferred that it should be dealt with in the framework of the draft articles, and agreed with the Special Rapporteur's approach to draft article 27.

81. His delegation's position on countermeasures was that their scope should be narrowly defined, since they lent themselves to abuse at the expense of weaker States; that they should not be punitive, but should be aimed at restitution and reparation or compensation, rather than punishment; that there should be an extensive third-party dispute settlement system; and that they should be applied, if at all, objectively and not abusively. His delegation stressed that armed countermeasures were prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which had become a customary rule of international law.

82. His delegation agreed with the Nordic States that third-party dispute settlement procedures were a sine qua non in modern international law and an indispensable protection for small and weaker States.

83. His delegation was of the view that the international community, having adopted the notion of *jus cogens* in the Vienna Convention on the Law of Treaties of 1969, must also take the next logical step of giving exact content to the concept. In that connection, he drew attention to document A/CN.4/54, paras. 16, 26 and 105 to 119, and document A/C.6/47/SR.21.

84. His delegation noted with interest the discussion that had taken place in the Commission on the basis of the report of the Chairman of the Drafting Committee. The issue of consent, which must be freely given, should be approached with caution since the very essence of the notion of peremptory norms was that they could not be derogated from by agreement between the parties, because that would be contrary to international public policy.

85. The relationship between the effect of *jus cogens* and that of Article 103 of the Charter of the United Nations should be made clear. Article 103 related to incompatibility and dictated that in case of conflict between the Charter and a treaty, the Charter prevailed. The effect of *jus cogens*, however, was more drastic, in that if established, it nullified the treaty.

86. On the topic of reservations to treaties (A/54/10, chap. VI), his delegation shared the view that the basic provisions on the subject were to be found in the Vienna regime on the law of treaties. It agreed with the approach taken of elaborating a Guide to practice rather than a more formal document.

87. Likewise, with regard to unilateral acts of States (A/54/10, chap. VIII), his delegation hoped that further progress would be made once replies had been received to the questionnaire in paragraph 594 of the report.

88. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/54/10, chap. IX), his delegation appreciated the useful work done by the Commission on the issue of prevention and the obligation of due diligence, and looked forward to fruitful progress on the second reading of the draft articles.

89. With regard to chapter X of the report, the Commission was on the right track in its planned future activities and contacts, as well as in the very useful International Law Seminar.

The meeting rose at 12.40 p.m.

United Nations A/C.6/54/SR.27

General Assembly
Fifty-fourth session

Official Records

Distr.: General
29 December 1999
English
Original: French

Sixth Committee

Summary record of the 27th meeting
Held at Headquarters, New York, on Thursday, 4 November 1999, at 3 p.m.

Chairman: Ms. Hallum ..... (New Zealand)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82199 (E)

The meeting was called to order at 3.55 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Ms. Ariyoshi** (Japan), referring to chapter VIII of the report of the International Law Commission (A/54/10 and Corr. 1 and 2), relating to unilateral acts of States, said that the issue had not been discussed sufficiently and that in particular not enough attention had been given to the very important question of actual practice. Her delegation welcomed the Commission's decision to conduct a survey by sending questionnaires to Governments, and Japan was in the process of preparing its response. Since the purpose was to give greater stability to the international legal system and ensure the rule of law, unilateral acts of States should not be discussed in the abstract. From that standpoint, Japan had doubts about the approach the Commission had adopted in the draft articles, which drew largely on the Vienna Convention on the law of treaties, without taking sufficient account of the fact that unilateral acts, by their nature and their effects, differed from treaty acts.

2. Concerning chapter IX of the Commission's report, relating to international liability for injurious consequences arising out of acts not prohibited by international law, her delegation strongly supported the Commission's decision to defer consideration of the question until it had completed its second reading of the draft articles on the prevention of transboundary damage from hazardous activities. Japan hoped that once the comments that Governments would submit on the draft articles by January 2000 had been taken into consideration, the draft text would refer more to actual practice. The Commission would also have to decide at the appropriate stage what recommendation it would make regarding the final form of the draft articles.

3. With regard to chapter X of the report, relating to other decisions and conclusions of the Commission, her Government was pleased that the Commission had identified the protection of the environment as one of the topics it might take up in the next quinquennium, and that it was examining feasibility studies on the polluter-pays principle, international control of environmental disputes, precautionary principles and obligations *erga omnes*. Like the Asian-African Legal Consultative Committee which represented 42 States, it firmly believed that the Commission should study the important question of the environment, and hoped that it would be able to define the scope and content of the topic. In order to assist it, Japan planned to submit written comments as requested in paragraph 33 of the Commission's report.

4. Her delegation noted the explanations the Commission had given in paragraph 639 of its report regarding the greater efficiency that could result from split sessions, but emphasized that, given the current financial situation of the Organization, her Government could not approve the new arrangement except on the understanding that it would not involve any additional costs and for the year 2000 alone, during which the necessary conference services would be available only during the dates scheduled for the split sessions.

5. **Mr. Diaz** (Costa Rica) said that his delegation did not approve of the direction taken by the Commission in its consideration of the question of unilateral acts of States. The definition it was proposing was restrictive, formalist, voluntarist and abstract; despite its intellectual merit, it was defective in failing to take account of the complexity of State practice. Nor was it useful to try to make a distinction between political and legal acts because, in international relations, all acts were political in nature. His delegation believed that the question to be asked in defining unilateral acts was whether or not they produced legal effects and under what circumstances they were carried out. The study of the subject should moreover be limited exclusively to acts capable of producing legal effects, among them, for example, autonomous unilateral declarations made with the express intention of producing legal effects.

6. The Commission should adopt a broader frame of reference than the one it was proposing and centre its proposal on good faith, estoppel and consent. The obligatory nature of an act did not arise from the unilateral will on the part of the declaring State to assume an obligation; yet that was difficult to demonstrate unless, precisely, the principle of good faith was taken into account. The autonomy of such acts, moreover, could only be relative. Although it might lack the Cartesian rigour of the Commission's reasoning, that interpretation had the advantage of being closer to State practice and by the same token more productive. If one held to the Commission's interpretation, one would have to admit that express declarations could indeed be subject to rules similar to those governing treaties. The question then arose as to the identity of the persons or entities making the declarations and the formalities and rules of interpretation that applied to them. From that legal standpoint, the wisest position was that such declarations could be made only by heads of State or Government, ministers of foreign affairs or expressly empowered officials. It was interesting to note that it had been suggested that when other authorities could commit the State unilaterally at the international level, that

capacity should be limited to circumstances in which the persons concerned were given an official mandate to conduct foreign policy in their field of competence and where their counterparts, to whom the unilateral declaration was addressed, were fully cognizant of that fact. Similarly, to the extent that such declarations were autonomous and their objective was to assume licit obligations or renounce rights to which the declaring State was entitled, that very autonomy precluded the declarations from imposing obligations on other States or conferring rights on the declaring State.

7. With regard to formalities, the only requirements were the clarity and deliberate nature of the expression of will, bearing in mind the terms used in the text of the declarations, their intention and the factual and legal context in which they were made. On the question of their duration, he believed that, in the light of the proposed definition, such acts were instantaneous because they did not go beyond the immediate expression of the will to assume an obligation. As to revocability, the acts in question could not be unilaterally revoked or restrictively modified . Once the declaration had produced legal effects and created rights or given powers vis-à-vis other States, it could not be revoked or limited except with the consent of the States concerned.

8. Turning to chapter V of the report of the International Law Commission, concerning State responsibility, he said that he supported the proposal aimed at establishing a distinction between the different types of States affected by an internationally wrongful act in draft article 40, which dealt with the meaning of injured State. The instances cited in paragraph 2 (e) (iii) in connection with rights created for the protection of human rights and in paragraph 2 (f) in connection with the collective interests of States parties should be given separate treatment. Moreover, once that distinction had been made, specific provisions on reparation in the event of an *erga omnes* obligation should be adopted, taking into account the valuable experience of human rights tribunals.

9. The inclusion in the draft articles on State responsibility of provisions such as those set forth in draft article 41, on the cessation of wrongful conduct, was questionable, since their reference to the binding nature of the primary obligation served no purpose. The same rationale applied to draft article 46 on assurances and guarantees of non-repetition. He did, however, support inclusion of the ideas contained in draft article 42, paragraph 3, and draft article 43 (d); in both cases, the provisions in question imposed reasonable limits on the duty of reparation, taking into account the fundamental rights of the population of the State having committed an internationally wrongful act. Both of those draft articles could be better formulated, however, with a view to eliminating their political character and indicating that they related only to extreme cases. The Commission might ask itself whether such instances should not be included under state of necessity or distress. Moreover, draft article 42, paragraph 3, should instead form part of draft article 44, since its provisions were applicable neither to satisfaction nor to guarantees of non-repetition. The phrase "if and to the extent necessary to provide full reparation" should be deleted from draft article 45, paragraph 1, as it was superfluous in an optional provision and appeared to subordinate that type of reparation to restitution and compensation. Draft article 45, paragraph 2 (c), should also be deleted, as its content was already covered under paragraph 2 (b).

10. In regard to countermeasures, draft articles 47, 49 and 50 were satisfactory inasmuch as they codified contemporary international law in that field. He also welcomed the Commission's aim in draft article 48 of making provision for the obligation to resort to a binding dispute settlement procedure and thereby contributing to the progressive development of international law. The idea contained in draft article 48, paragraph 3, that countermeasures should be suspended when the dispute settlement procedure was being implemented was worth retaining. Referring to the suggestion in paragraph 29 of the Commission's report that the link between the taking of countermeasures and compulsory arbitration should be avoided, he said that such a link should be maintained if the draft articles were adopted in the form of a treaty, although it should also be stipulated that the two parties to the dispute could, if they so wished, resort to the procedure for the peaceful settlement of disputes.

11. Concerning draft article 51 to 53, he said that the concept of international crimes was not without merit from the standpoint of the progressive development of law; however, in view of its experimental character, it was not very useful in the draft articles that the Commission was preparing to adopt in final form. The Commission could return to the question if it was the subject of a significant international practice that specified its outlines and consequences. As for the potential consequences of such crimes, the obligation under draft article 53 (a) and (b) not to recognize as lawful the situation created by the crime and not to render aid or assistance to the State which had committed the act could prove useful when examining the consequences of violation of *erga omnes* obligations, in which case it merited more thorough consideration. Lastly, the idea of considering the plurality of States in the context of the draft articles was an interesting one, as it raised an

extremely important point which the draft articles had not touched upon.

12. Concluding his views on the topic of State responsibility, he said that the rule concerning the exhaustion of local remedies was linked to the primary rules concerning the guarantees of a regular procedure and the existence of such remedies. The nature of that rule was therefore dependent on the nature of the primary obligations in each case. With a view to avoiding any possible confusion, reference to denial of justice could be made. In any event, that rule applied only to diplomatic protection, for which reason he favoured the second formulation proposed in paragraph 240 of the Commission's report. In addition, he was concerned to note that the Commission, which was a body composed of experts acting in their personal capacity, should be examining a question that fell within the competence of States, namely, that of humanitarian intervention. In his view, such intervention should be considered only by the political forums of the United Nations. Moreover, it was not a question that formed part of the topic of State responsibility. Although humanitarian intervention was based on a Security Council decision, no State responsibility was involved, since decisions of the Security Council outweighed any other primary rule. Otherwise, that responsibility would continue to exist owing to the prohibition of the use of force, which had the nature of *jus cogens*. Draft article 33, paragraph 2 (a), should therefore be retained.

13. **Mr. González** (Venezuela) said that the draft guidelines on reservations should develop the Vienna regime and ultimately culminate in the adoption of a draft convention following completion of the Guide to Practice in which they were to be included, thus contributing to the codification and progressive development of that area of international law. The proposed definitions of reservations and of interpretative declarations contained in draft guidelines 1.1 and 1.2 were wholly satisfactory. In connection with draft guideline 1.5.1 on reservations to bilateral treaties, he shared the view of those delegations that believed that such reservations were unauthorized and implied renegotiation of the treaty. He supported draft guideline 1.4, which provided that unilateral statements other than reservations and interpretative declarations were outside the scope of the Guide to Practice. In his view, declarations aimed at the assumption of unilateral commitments beyond those imposed by the treaty formed part of the Commission's work on unilateral acts.

14. Turning to the issue of unilateral acts of States, he said that the second report of the Special Rapporteur contained very significant elements. Those elements, however, depended on the definition attributed to such acts, which should be elaborated on the basis of the views of Governments and the practice of States. On that score, he noted that the Commission, on the recommendation of the Working Group, had adopted a provisional text on which Governments had been requested to express their opinions. The provisional text should be completed and finalized in 2000, taking into account the reports of the Special Rapporteur, the conclusions of the Working Group and the comments of Governments, as it concerned an important aspect of international law that should be regulated in practice. Furthermore, he believed that the Vienna Convention should serve as the reference for work on the topic, which did not mean to say, however, that its provisions should be applied *mutatis mutandis* to unilateral acts or that the latter should be likened to conventional acts, from which they differed in several respects.

15. With regard to the interpretation of unilateral acts, he said that the Special Rapporteur and the Commission should also take into consideration characteristics inherent in acts whose elaboration and intention differed from that of conventional acts, which depended on agreement and not on a State's expression of its willingness to produce legal effects. Moreover, the modification, suspension or revocation of unilateral acts must not depend solely on the will of the author State. The granting of consent by the addressee State was considered indispensable. It was important to distinguish between the unilateralism that characterized the elaboration of the act and its legal effects, which could give rights to States that had not participated in its elaboration. Once the unilateral act was elaborated and the State had expressed its willingness to engage in a relationship with another State, the relationship created was not unilateral. Indeed, unilateral acts were closely linked with other topics that the Commission was currently considering, such as reservations, which were unilateral declarations which could be considered (following the Commission's example) to arise out of conventional law or, as his delegation believed, to arise out of the law governing unilateral acts or that pertaining to international liability.

16. **Mr. Winkler** (Austria), referring to chapter IV of the Commission's report, said that his delegation had noted with satisfaction the final text of the draft articles on the nationality of natural persons in relation to the succession of States adopted on second reading. That draft was on the whole satisfactory and should be adopted in the form of a declaration, as the Commission had proposed. His delegation agreed with the Commission, and with a large number of delegations that had previously spoken, that the work on that topic should be considered finished. Even though some

delegations were not entirely satisfied, the result of those efforts helped to clarify certain basic principles and rules which provided greater security to States and persons in the matter of nationality in relation to the succession of States, within the context of respect for humanitarian principles.

17. With regard to reservations to treaties, most of the concerns that his delegation had raised in 1998 remained valid, such as that some provisions contained overly detailed definitions and that others were perhaps redundant. That was true, for example, of the slightly modified text of former guideline 1.1.5, renumbered as 1.4.1: the fact that a State or an international organization expressed its willingness to increase its conventional obligations did not of course modify the legal effects of obligations arising out of that treaty. Thus, by definition, a unilateral declaration did not constitute a reservation to a treaty. It was not apparent what that provision added to the Guide to Practice.

18. Turning to chapter VIII, on the unilateral acts of States, he said that work was at an early stage. At the current preliminary stage, his delegation did not see in what direction the Commission intended to take it, and hoped that a more detailed report would be submitted to the Assembly on the topic the following year. In particular, his delegation was not convinced that the approach chosen, which consisted in taking the Vienna Convention on the Law of Treaties as a point of reference, was the correct one. In that regard, it had noted with great interest the statement by the representative of France, and entirely supported his remarks concerning articles 1 to 3. The fact that the intention of the State when making a unilateral declaration was not taken into account was a problem in the text under consideration.

19. Turning to the report of the Working Group on the jurisdictional immunities of States and their properties, his delegation was pleased that consideration of that topic had been resumed, and appreciated the Commission's work in 1999. The merit of such an exercise was mainly to ensure that the prevailing restrictive view on the matter of the immunity of States was accepted more uniformly by the greatest possible number of States, and to help national courts to take decisions along those lines.

20. With regard to the topics listed in the Commission's long-term programme of work, his delegation noted that they covered a wide spectrum. It was striking to observe how international law had diversified, and how the various fields of law once considered external had gradually acquired an internal dimension. Various fields had been legalized and institutionalized, and had their own rules and regimes. That internationalist trend should be welcomed in every respect. At the same time, the substantial increase in the number of legal fields and regimes had resulted in a fragmentation of international law. That needed not be seen as a danger to a uniform concept of international law. Fragmentation was not a concept; it was simply a fact that arose from the multitude and variety of international relations, but that might lead to conflicts between varying norms and regimes, thus undermining the authority of international law. A solution to that problem was not easy to suggest. What could be done was to take existing law into careful consideration when elaborating new norms and establishing new regimes, with a view to avoiding future conflicts. In his delegation's view, the Commission should be asked to give some thought to that issue, which was of crucial importance for the future of international law in the next millennium.

21. The topics that the Commission proposed to consider in future usefully reflected the problems that called for more comprehensive discussion, and if possible, codification. Without denying the importance of other topics mentioned, his delegation attached particular importance to the question of the responsibility of international organizations and the effect of international conflicts on treaties, two growing problems in international relations.

22. Another field of international law that merited the Commission's attention was international environmental law. Admittedly, the Commission was already discussing some aspects of that matter under the topic of international liability, and had presented the first draft articles on prevention to the General Assembly the previous year. As necessary and useful as that might be, other aspects of the topic were just as important and should be taken up as soon as possible. With regard to environmental law in general, an overall draft covering all of its aspects was unfeasible for practical and doctrinal reasons. The environment was addressed by a number of legal regulations from the most varied fields of international law, including treaty law. International environmental law must not be separated from the general structure of international law; on the contrary, the two must be reconciled without relinquishing the particularities of the former. It was conceivable that the Commission, taking into account the general structure of international law, might concentrate its efforts on particular issues of environmental law, such as the precautionary principle or the "polluter pays" principle.

23. **Mr. Gomaa** (Egypt) said, first, that among the Commission's working methods, the identification and selection of topics was an important matter. The planning group of the enlarged bureau should concentrate on questions which were at the heart of international relations and were of importance to the whole of the international community as reflected in the summarized criteria laid out

in paragraph 553 of the Commission's previous report (A/53/10). In his delegation's view, topics to be selected should be sufficiently advanced from the standpoint of State practice. It seemed, however, that that criterion had not been fully observed when selecting certain topics currently under consideration by the Commission. In addition, his delegation shared the view that split sessions would allow for inter-sessional deliberations and reflection, and should improve participation in the Commission's meetings. It also noted with appreciation that some progress had been made in putting the publication of the *Yearbook of the International Law Commission* back on schedule.

24. Turning to the matter of reservations to treaties, his delegation believed that the regime established under the Vienna Convention on the Law of Treaties should be preserved, since it continued to reflect the state of the art. It had been adopted after extensive discussions in the General Assembly, following its consideration by the International Court of Justice, the Commission itself, and three successive conferences on treaty law. The Special Rapporteur had therefore rightly taken the definition of reservations set forth in the Vienna Conventions of 1969, 1978 and 1986 as a starting point. The Commission had also rightly decided that the provisions of those three Conventions with respect to reservations should not be altered.

25. On reservations to treaties, he said that any regime should respect the differing characteristics of the various elements making up the international community. Hard and fast rules did not serve the purpose of creating a universal regime for reservations. If it ended up excluding the participation of some countries from a particular treaty arrangement, the very concept of universality — which the practice of reservations aimed to uphold — would collapse. In 1962 the Commission had been in favour of a flexible system that would maintain the balance between the widest possible participation and the preservation of the integrity of the treaty, as designed by the International Court of Justice in its Advisory Opinion of 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. That regime had been carried into the 1969 Vienna Convention and later into the other two Vienna Conventions. There was no reason why the same approach should not be maintained.

26. The law of treaties, particularly the Vienna regime, did not draw a distinction between human rights treaties and other multilateral treaties. Furthermore, there was no reason to seek to establish a distinct regime on reservations for one area of codification, namely human rights, while all other areas remained subject to general rules. The fact that human rights constituted a self-contained regime should not be used as a pretext for creating a special reservations regime. Self-contained regimes more or less avoided the application of the general legal consequences of wrongful acts, but the secondary rules dealing with, among others, the introduction, modification and termination of legal rules themselves applied to such regimes as to others. The Commission might not be the most appropriate forum to discuss the disquieting attitude of human rights monitoring bodies, which claimed to be competent to assess the compatibility of reservations and to decide on their effect and scope, and thus their admissibility. He was, however, justified in addressing the issue because such claims were among those being looked at by the Commission in deciding whether there existed a distinct regime of reservations to human rights treaties. While attaching importance to the work of those monitoring bodies, his delegation believed that they should remain within their prerogatives and that, when their mandates contained no provision to that effect, the admissibility of reservations lay absolutely outside their competence. In fact, only the courts were competent to determine the admissibility and effect of reservations. For that reason his delegation believed that the comments received by the Commission from such bodies did not accurately reflect the legal regime of reservations to treaties.

27. Connected with the principle of universality in general multilateral treaties, particularly normative ones, was the question of interpretative declarations. Such declarations were often the only way for States to accede to a general multilateral instrument, by explaining their position on and interpretation of certain of its provisions. He therefore hoped that the Special Rapporteur would consider interpretative declarations in the light of the specificities of different cultures which influenced the legal regimes of nations.

28. With regard to State responsibility, he agreed with the Special Rapporteur that obligations *erga omnes* needed further elaboration. In the same vein, it should also be pointed out that *jus cogens*, the most important innovation of the Vienna Convention on the Law of Treaties, continued to raise questions and did not seem to be universally interpreted and applied in the same way. As for the relationship between the draft articles on State responsibility and other rules of international law, the draft should continue to respect *lex specialis*. He saw no merit in the distinction between "criminal" and "delictual" responsibility if it did not reflect the procedural or consequential impact of such a distinction in terms of a differentiated action to be taken against the wrongdoer State in either case. Indeed, the distinction between "primary" and "secondary" rules was imperfect and sometimes difficult to draw. His delegation

therefore commended the Special Rapporteur on his caution in not straying too far in the field of "primary" obligations for the purposes of State responsibility.

29. With regard to the question of how to reconcile the different parts of the draft relating to the breach by a State of its obligations when no breach was intended, the Special Rapporteur was right to seek a solution in the "structure" of the draft, creating a physical link between the parts on breach and those on "preclusion of wrongfulness". While it might not be practicable or desirable to draw up detailed provisions on countermeasures, the relationship between countermeasures and the resort to third-party dispute settlement was intricate.

30. With regard to the question raised by the Commission as to whether a distinction should be drawn between States specifically injured by an internationally wrongful act and other States having a legal interest in the performance of the relevant obligations, it had to be clear that an "injured" State was one to which an international obligation was due. An excellent account of that was to be found in the 1949 Advisory Opinion of the International Court of Justice on the *Reparation for injuries suffered in the service of the United Nations*, as well as in the work of the former Special Rapporteur, Mr. Riphagen, reflected in Part Two of the draft articles. It was legally sound to conclude that, although all other States might be affected by the breach because of a legal interest in the performance of the obligation, they were not necessarily "injured" and could not be assumed to be so. On another issue addressed by the Commission, namely, the breach of an international obligation by a plurality of States, his delegation believed that the Commission's work would be undone if the issue was not covered by the draft.

31. With regard to the relationship of the draft to the 1969 and 1986 Vienna Conventions on the Law of Treaties, in view of the blanket proviso of article 73 and, of course, the regime set up under article 60 of the two Conventions, it was important to respect the parallelism between the two major branches of international law, namely, the law of treaties and the law of international responsibility. It was true that the relationship between them was particularly close in the work of the Commission; nevertheless, the draft should not blur the distinction between them with respect to the breach of contractual obligations. At the same time, there should be constant cross-references emphasizing the complementarity of the Convention and the draft articles.

32. As to the provisions on necessity as a circumstance precluding wrongfulness, his delegation agreed with the Commission that the issue of humanitarian intervention involving the use of force was extremely controversial. Such intervention violated the most salient peremptory norm, namely, the non-use of force in international relations.

33. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had moved surprisingly fast on the adoption on first reading of 17 draft articles, together with their commentaries. In 1999, however, the Commission had had to decide whether it should proceed with its consideration of the topic, suspend work until it finalized the second reading of the draft articles on the regime of prevention or terminate its work on the topic altogether. His delegation believed the second option to be more realistic and commended the Commission on having adopted it.

34. On a substantive note, the obligations in the area of the "prevention of transboundary damage from hazardous activities" were unclear as far as "damage" was concerned. It would not be practicable to attempt to solve the issue of the "duty of prevention" by making it hostage to the theoretical considerations of "obligations of conduct", which was the obligation of due diligence. There needed to be a more solid and objective legal basis for measuring compliance and identifying the degree of violation. The dispute mechanism under discussion might, in fact, compensate for any shortcomings of the current regime. In that respect, the mechanism should not stop at direct contact between the parties concerned. It was true that the issues involved were more amenable to consultation and negotiation, but if the latter did not yield solutions, the mechanism should extend to all other means of dispute settlement, in line with Article 33 of the Charter of the United Nations. Damage was damage, whether it had arisen from legal or illegal acts. It should not be forgotten that the whole field of prevention of transboundary damage from hazardous activities was a new one and raised technical and legal issues. The relevant norms varied from one State to another according to the level of technological and economic development. Accordingly, the issue should be treated with the greatest care and the adjournment of the Commission's work would provide an opportunity to reflect on the many questions raised both within the Commission itself and by Governments.

35. Lastly, with regard to jurisdictional immunities of States and their property, his delegation noted with satisfaction the progress made. The five issues that the Commission had reviewed allowed the topic to be examined from a new angle at a time when it seemed that a deadlock had been reached. The Commission had made useful suggestions and its analysis of international practice would be useful for the work of the working group of the Sixth

Committee that was scheduled to meet for the first time the following week. Egypt looked forward to taking an active part in the meetings.

36. **Mr. Rogachev** (Russian Federation) emphasized that the topic of unilateral acts of States was one of the most complex in both the doctrine and practice of international law, not only because of the extraordinary variety of such acts, but also because they were omnipresent in international relations since they were the most direct means that States had of expressing their will. The relevant work of the Special Rapporteur would provide an excellent basis on which to continue examining the topic.

37. On the substantive issue, it was certain that, as in the case of treaties, unilateral acts of subjects of international law could create legal norms; that was confirmed by both State practice and international precedents. Nevertheless, as the Commission had indicated, considerable uncertainty reigned as to the legal regime on such acts and was a potential source of conflicts.

38. The Russian Federation agreed with the general approach adopted by the Commission, which consisted in limiting its discussions to certain categories of unilateral acts and excluding, for example, acts relating to the interpretation and application of treaties, acts performed in the exercise of jurisdiction according to international law, acts engaging the international responsibility of their author and those that were essentially internal with regard to their nature and effects. Moreover, in view of the characteristics of international organizations, it was preferable to exclude their unilateral acts from the discussions, for the time being.

39. Furthermore, the Russian Federation was not entirely convinced that estoppel should be excluded from the study of the unilateral acts of States. Indeed, estoppel usually resulted from a unilateral act, the State performing the act losing, because of estoppel, the right to use a certain fact or situation as a basis for asserting its rights. The Russian Federation believed that estoppel was not merely a procedural instrument, but related directly to the topic under discussion.

40. In principle, the Russian Federation was not opposed to excluding discussion of acts that had no legal effect at the international level, but it believed that flexibility and prudence should be shown in that regard. It was not always possible to establish a precise, reasoned distinction between "political" acts and "legal" acts. Indeed, numerous unilateral acts, whatever their content, could be classified as "political", while certain unilateral acts not originally intended to have legal effects at the international level could have such effects. His delegation agreed with the Special Rapporteur that the Commission should study unilateral acts that were formal legal acts; in other words, it should study not the content of the norms to which the acts gave rise, but the process that created those norms. However, the content of the acts and the circumstances in which they were carried out could not be totally ignored.

41. For procedural reasons, his delegation could not accept the Special Rapporteur's proposal to limit the scope of discussion to autonomous unilateral acts that created legal effects. In effect, the autonomy of unilateral acts was totally conditional since the legal obligation that they created arose not from the unilateral expression of the will of the State that issued them, but rather from the compatibility between that will and the interests of other States. It was unimaginable that a unilateral act would have legal effects in the relations between its author and another subject of international law if the latter had raised objections. Furthermore, a State that made a unilateral declaration took into consideration the reactions of those to whom it was addressed.

42. In that regard, his delegation agreed that discussions should primarily focus on unilateral declarations, although it should be understood that all forms of expression of will should be considered, including silence.

43. Lastly, with regard to the form that the results of the Commission's work on the topic of the unilateral acts of States should take, his delegation agreed that draft articles should be prepared, accompanied by commentaries.

44. **Mr. Sun Guoshun** (China), referring to chapter VIII of the Commission's report, emphasized the need to codify the laws on unilateral acts of States and promote their progressive development. Since unilateral acts were present in numerous areas and could have different legal effects, it was extremely difficult to establish precise rules and regimes that did not constitute a source of dispute at the international level.

45. There were those who held that unilateral acts included not only legal acts but also political acts, while others believed that only the former should be considered. The distinction between the two categories of acts was not always easy to establish. At times, an act could be both political and legal, as in the case of unilateral declarations offering certain kinds of security guarantees by nuclear-weapon States without consultation with non-nuclear-weapon States.

46. The Working Group established by the Commission at its fifty-first session had defined the unilateral acts of States as acts carried out with the intention of producing legal effects on the international plane, not only with the

intention of acquiring international legal obligations. Despite encouraging progress, problems still existed. First, there was a gap between intention and result, in other words, acts performed with the intention of producing legal effects did not necessarily achieve the intended results. Second, acts that did not intend to produce legal effects sometimes produced them. Lastly, it was difficult to ascertain if the intention of the author State was to produce legal effects. Therefore, China suggested that the word "intention" should be explained in the commentary. Furthermore, it did not understand why the term "autonomous" had been deleted from the definition, and proposed that it should be retained.

47. It was impossible to codify all unilateral acts within a single legal regime, because of their great diversity. China therefore believed that a prudent approach should be taken, excluding unilateral acts of States that were related to treaty law, acts that were already regulated by international legal norms, and those that did not produce international legal effects, but without merely restricting the topic to unilateral statements.

48. Some unilateral acts of States aimed to establish obligations for the author, others to establish rights, and still others to establish both obligations and rights; that question merited serious study. On the one hand, regulations regarding unilateral acts of States were not subject to the rule *pacta sunt servanda* as treaty law. On the other hand, unilateral acts of States did indeed produce some legal consequences in international relations, and different unilateral acts might produce different consequences. The legal effects of some unilateral acts might be based on the necessity to honour a commitment, or the principle of good faith, whereas unilateral acts aimed at establishing rights for the *author* State might have another basis.

49. Since many aspects of that topic were related, in various degrees, to treaty law, relevant articles of the Vienna Convention on the Law of Treaties could be used for reference when provisions were being formulated. Regarding the addressee of a unilateral act, his delegation shared the view of the Working Group that it could be a State or a governmental organization. Some procedural provisions such as those concerning the interpretation, correction, suspension and termination of a unilateral act could also draw from the relevant provisions of the Vienna Convention on the Law of Treaties.

50. **Mr. Ouraga-Obou** (Côte d'Ivoire), referring to chapter VI of the Commission's report, "Reservations to treaties", noted that the sole aim of his statement was to refer to the definition of "interpretative declaration". The work of the Special Rapporteur showed that in the final analysis there was no single or unequivocal concept of interpretative declaration. As defined in the context of multilateral treaties, it was not properly speaking a legal act, which was not the case in the context of bilateral treaties, where it would not be deprived of all legal effect. Clearly, those two distinct legal regimes were in fact the result of the difference in nature, not in degree, between those two categories of interpretative declarations, a difference which should be clarified. It would be useful, in the interests of clarity, to find a more complete and less ambiguous definition, which would be more satisfactory. Without contradicting the proposed draft articles, his delegation hoped that the Commission would agree to refer in the definition of "interpretative declaration" to the legal nature of the act subject to interpretation — better a multilateral or a bilateral treaty — and the extent to which it might produce legal effects, so that there would be no ambiguity.

51. **Mr. Uykur** (Turkey) noted, on the subject of unilateral acts of States, that even if the Vienna Convention on the Law of Treaties provided an appropriate framework for the work of the Commission, one should not lose sight of the differences between treaty acts and unilateral acts when formulating the governing rules for them. In that respect, States acting unilaterally were not entitled to erode, to their own advantage, a particular balance which had been established by the relevant treaty provisions constituted with the consent of its parties.

52. On the question of the capacity to take on international commitments on behalf of the State by means of a unilateral act, heads of State, heads of Government and foreign ministers were widely regarded as having that capacity. However, a restrictive approach should be followed with regard to other State officials who had the said capacity. In that connection, it was interesting to take into account the decision of the International Court of Justice in the *Gulf of Maine* case, where the Court had considered that the letter of an official of the Bureau of Land Management was not an official declaration of the State concerned. It was also necessary to make a distinction between legal acts and declarations of a political nature, and the intention of creating legal effects seemed to be an appropriate criterion there.

53. Similarly, the different types of unilateral acts such as protest, promise, waiver, recognition or notification should be dealt with taking into account their differing aspects. That approach could provide a reliable basis, particularly with regard to revocation. His delegation welcomed the questionnaire circulated to Governments to seek information on their views and practices, as it would enable the

Commission to depict the general tendencies and practice of each State in that field.

54. On the topic of reservations to treaties, and the question of their admissibility, it was a questionable understanding that a State putting forward a reservation which the other States parties to the treaty found inadmissible should be deemed a party to the treaty, the reservation notwithstanding. That approach not only disregarded the consent expressed by the State in question on becoming a party to the treaty, but would also have negative implications for the basis of treaty law.

55. With regard to guideline 1.4.5, "Statements concerning modalities of implementation of a treaty at the internal level", the phrase "without purporting as such to affect its rights and obligations towards the other contracting parties" was used in place of the wording in the previous version "but which does not affect its rights and obligations towards the other contracting parties". His delegation had some concerns about the possible implications of the new formulation for the rights of States other than the author of the statement. Indeed, the rights of third States should not be negatively affected by a statement of that kind. In particular, the words "as such" could lead to disputes on the nature of a particular statement, in cases where the statement was likely to affect the rights and obligations of third States. His delegation thought that the new phrase included in that guideline should be studied further.

56. In conclusion, his delegation noted that it would submit to the Commission in writing the views of Turkey on international liability for injurious consequences arising out of acts not prohibited by international law, and on State responsibility. Nevertheless, his delegation wished to place on record its objection to one issue referred to in paragraph 109 (c) of the second report of the Special Rapporteur on State responsibility (A/CN.4/498). Utmost care should be taken in order to avoid misleading qualifications when individual cases were being tackled.

The meeting rose at 5.20 p.m.

United Nations A/C.6/54/SR.28

General Assembly
Fifty-fourth session

Official Records

Distr.: General
10 December 1999

Original: English

Sixth Committee

Summary record of the 28th meeting
Held at Headquarters, New York, on Friday, 5 November 1999, at 10 a.m.

Chairman: Mr. Franco (Vice-Chairman) ..... (Colombia)

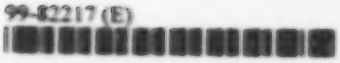
Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

99-82217 (E)



In the absence of Mr. Mochochoko (Lesotho), Mr. Franco (Colombia), Vice-Chairman, took the Chair.

The meeting was called to order at 10.15 a.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Ms. Telalian** (Greece), referring to chapter V of the Commissions's report, said that the adoption of the draft articles on State responsibility in the form of a convention would contribute greatly to the prevention of internationally wrongful acts. Her delegation noted with satisfaction the progress made by the Commission on chapters III, IV and V of the draft articles. Her delegation was pleased with the Special Rapporteur's recasting of chapter IV and could go along with the Commission's decision to narrow the application of article 27 so that, if a State assisted another State in performing a wrongful act, its own responsibility would be entailed.

2. One of the most sensitive issues was the question of countermeasures, which was dealt with in chapter V, part one, and chapter III, part two. The institution of countermeasures existed in international law, as shown by State practice. The International Court of Justice had provided useful guidance on countermeasures in the *Case concerning the Gabcikovo-Nagymaros Project*, in which the Court had considered that countermeasures fell within the scope of State responsibility. In that judgement, the Court had examined the lawfulness of countermeasures from the standpoint of the conditions that must be met to avoid potential abuse on the part of the injured State. A basic element in that regard was the principle of proportionality, in the sense that countermeasures must be commensurate with the injury suffered. Another condition of lawful countermeasures was reversibility. The Commission should reflect upon such legal limitations in its consideration of circumstances precluding wrongfulness.

3. Her delegation supported the idea that countermeasures should be linked to compulsory arbitration, which would facilitate the peaceful settlement of disputes. Nevertheless, the issue raised many controversial questions, such as which State should have the right to commence arbitration.

4. Furthermore, countermeasures against an international crime, such as genocide or aggression, should entail the legal consequences arising under the collective security system established by the Charter of the United Nations. Indeed, the adoption of countermeasures should not be left to individual States, but should be the prerogative of the Security Council, acting under chapter VII of the Charter.

5. Her delegation considered the inclusion of the definition of State crimes in article 19 to be one of the Commission's major achievements.

6. The Commission's decision to divide internationally wrongful acts of States into "international delicts" and "international crimes" was at the core of the whole concept of State responsibility, which in turn was a pillar of international law.

7. Turning to the topic of reservations to treaties (A/54/10, chap. VI), she said that the definition of reservations contained in the report was a balanced one. The inclusion of unilateral declarations that concerned the treaty as a whole, and not just some of its provisions, was a positive step.

8. Cross-border declarations that excluded the application of the entire treaty under certain circumstances were really reservations and should be treated as such. The section of the Guide to practice that dealt with that issue clarified the ambiguity existing in the definition of reservations under the Vienna regime.

9. There had recently been an increase in unilateral declarations that excluded or limited the application of a treaty as a whole to certain categories of persons; it was unclear, however, whether such declarations could be identified as reservations. In the context of the European Framework Convention for the Protection of National Minorities, for example, States had submitted "declarations" concerning their understanding of the notion of national minorities. The legal effect of such declarations was not yet clear, and the Convention monitoring body would soon be confronted with that question.

10. Nevertheless, the monitoring bodies of the European Convention on Human Rights, particularly the European Court of Human Rights, had consistently treated such cross-border declarations as reservations and had examined their validity in the light of the special nature of the Convention.

11. The Guide also laid down criteria for determining whether a unilateral declaration was a reservation. That distinction was important in view of the legal consequences attaching to reservations. Moreover, States needed to know the legal character of a unilateral statement for the purposes of the application of the 12-month tacit acceptance rule under article 20, paragraph 5, of the Vienna Convention on the Law of Treaties. The criterion of the content, rather than the form, of a unilateral declaration and that of the drafters' intention to modify or restrict the legal effect of certain

provisions of the treaty were decisive in order to make that distinction.

12. Reservations to treaties, particularly human rights treaties, raised many difficult and controversial questions relating to their admissibility. Most human rights treaties did not contain a reservation clause, and reservations to them were subject to a test of compatibility with the object and purpose of the treaty. The confusion and uncertainty that existed in relation to the system of compatibility and opposability, as laid down in articles 19 to 23 of the Vienna Convention on the Law of Treaties, must be addressed on a priority basis. The competence of the human rights monitoring bodies to determine the compatibility and validity of reservations should also be explored.

13. With regard to nationality of natural persons in relation to the succession of States (A/54/10, chap. IV), the draft articles, which should be submitted to the General Assembly in the form of a declaration, contained many positive elements. She noted, however, that they were drafted mainly along the lines of national legislation governing procedural issues of nationality, rather than as rules or standards of international law.

14. Furthermore, article 19, which gave third States the right to intervene in a matter in which they had no competence, should not be included in the text.

15. The right of option, which was granted only in part two and not in part one, raised many questions. Her delegation failed to understand the reasoning behind article 26, whereby the predecessor State gave a right of option even to that part of its population which had not been affected by the succession.

16. Lastly, her delegation noted with satisfaction that former article 27 had been deleted from the draft. Current article 3 was well drafted and in line with the principles of international law. Her delegation objected strongly, however, to the inclusion in the commentary on that article of the ideas that had been contained in former article 27. Indeed, the last paragraph of the commentary might lead to the conclusion that the aggressor might give his nationality to the victim population. Such a solution was also contrary to the two Vienna conventions on succession of States.

17. Notwithstanding those comments, her delegation believed that the draft articles could serve as useful guidelines for States.

18. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/54/10, chap. IX), she said that her delegation supported the Commission's decision to focus first on the question of prevention of transboundary damage before embarking on the issue of compensation for harm caused. The latter issue was, however, a very important element of the topic of prevention and should not be separated from it. Moreover, a future international instrument on prevention should also contain the obligation of reparation for damage caused. The Commission should undertake an examination in depth of that question.

19. **Mr. Dufek** (Czech Republic), referring to chapter VIII of the report, said there was no doubt that States frequently entered into political and legal commitments by means of unilateral acts. Such acts were often of considerable importance in international relations, yet they remained ill-defined in international law. Accordingly, the Commission's efforts to bring a degree of certainty and predictability to the functioning of unilateral acts were of great value. His delegation noted with satisfaction that the Secretariat had recently circulated a questionnaire to Governments concerning their practice in that area.

20. His delegation agreed with the Commission that at the current stage the scope of the study on the topic should be confined to unilateral acts of States. While other subjects of international law, particularly international organizations, were also able to carry out unilateral acts, it would be very difficult to formulate general principles relating to both States and international organizations. There was no legal regime common to all international organizations, and it was difficult to define general rules even with regard to the organizations themselves.

21. His delegation believed that the Vienna Convention on the Law of Treaties of 1969 should serve as a model for the elaboration of the draft articles on unilateral acts. The Convention appeared to have been especially helpful in the drafting of articles 4 and 7 proposed by the Special Rapporteur.

22. Nevertheless, his delegation had misgivings regarding article 6. While rules on the expression of consent to be bound by an obligation were undoubtedly very important, his delegation was not convinced that it was necessary in that instance to abide strictly by the Vienna Convention, particularly article 11 thereof. In its view, all the essential rules could be derived from the definition of unilateral legal acts in draft article 2, and no specific provision was necessary in that regard.

23. Concerning draft article 2, his delegation preferred the term "unilateral act" to "unilateral declaration", since it understood the term "declaration" to mean the form in which an act was formulated.

24. Concerning draft article 3, it was self-evident that all States had the capacity to formulate unilateral legal acts; hence, the provision was unnecessary.

25. The Czech delegation shared the majority view in the Commission that it was inappropriate to deal with the issue of reservations in connection with unilateral acts. Reservations were a specific kind of unilateral act which could be discussed only in the context of the law of treaties.

26. **Mr. Keinan** (Israel), referring to chapter VIII of the report, reiterated his delegation's concern that any attempt to classify unilateral declarations within strict categories would run counter to international practice, with the inevitable result that ways would be found to bypass the restrictions. Nevertheless, in the light of the general trend towards proceeding with consideration of the topic, he would concentrate on the issues referred to in the opening statement by the Chairman of the Commission.

27. His delegation shared the view that in the search for an adequate definition of unilateral acts of States, it would be beneficial to draw parallels with the law of treaties and to utilize that law, *mutatis mutandis*, as a guide.

28. His delegation was also of the view that unilateral acts of States should not be subject to specific formal criteria. The problem resided in the interpretation of the State's intention and the circumstances in which the declaration was made, as well as the content of the declaration. Such matters could not be settled strictly by general rules.

29. The Special Rapporteur's suggested focus on the intention of the performing State as a criterion for determining the possible legal consequences of a unilateral act was problematic, in view of the difficulty of evaluating a manifestation of the will of a State. The line between acts intended to produce legal consequences and those falling within the realm of politics was often blurred. Statements of intent were not necessarily meant as legally binding commitments unless the surrounding circumstances made that clear. Accordingly, emphasis should be placed on defining unilateral acts of States on the basis of circumstances from which the legal nature of the act could be inferred.

30. With regard to the definition of unilateral legal acts in draft article 2, his delegation agreed that the expression of will must be demonstrated unequivocally. That did not imply that the content of the declaration could not be vague or subject to conditions. Indeed, there might be instances where declarations of that kind would also entail legal consequences. The term "unequivocally" should be defined as distinguishing between unilateral acts that used the language of obligation in respect of future conduct and those in which a State only "intended" or "planned" to take action.

31. Moreover, the expression of will should be formulated with the intention of acquiring or maintaining international legal obligations or rights, rather than legal obligations alone.

32. His delegation shared the view that the requirement of an autonomous expression of will was of great importance, although the terminology might be confusing, as the Special Rapporteur had also intended it to encompass the notion of being independent of pre-existing treaty or customary norms. His delegation had doubts as to whether such a requirement was practical, in that unilateral acts of States were often formulated in relation to treaties, while still preserving their autonomous nature. In any event, if such a distinction was to be made, it should be referred to separately and explicitly.

33. In that connection, his delegation wished to comment on the Special Rapporteur's assertion that the content of a unilateral act could not be subject to conditions, as such acts were presumed to fall within the treaty sphere. While conditions that required the acceptance of another State would strip the unilateral act of its autonomous nature, in the sense in which that term was understood in the current draft, other kinds of conditions might be permissible, for instance, in cases where a State undertook to act in a certain way, provided that no change in circumstances took place or that certain natural events occurred.

34. As to the element of publicity, his delegation shared the view that such a requirement should be understood in the strictest sense, and that a unilateral act must be notified explicitly by the performing State to the addressee of the act in order for it to produce legal effects. Any other interpretation would run counter to the concept of informal consultations and confidential negotiations, which were essential in the international arena.

35. As to the capacity to formulate unilateral acts, his delegation agreed that for a unilateral act to produce international legal effects, it must be formulated by a representative empowered to engage the State in its international relations, such as heads of State, heads of Government and ministers for foreign affairs. Other representatives, such as ministers, diplomats and official experts, should not be considered as competent organs of a State for the purpose of formulating legally binding unilateral acts.

36. Despite the considerable impact of unilateral acts of States on the development of customary international law, State practice was not uniform, and it provided only a limited

number of cases in which a unilateral act had been recognized as binding. The utmost care should be used in defining that element, as absurd situations would otherwise result in which States would be compelled to designate a legal adviser to examine the possible legal ramifications of every public statement made by their officials.

37. Lastly, his delegation urged the Commission to examine additional elements not discussed in the reports of the Special Rapporteur, such as the duration of validity of unilateral acts of States, the capacity to annul a unilateral act in force and the validity of conflicting unilateral acts made by different official representatives of a State.

38. **Mr. Martens** (Germany), referring to chapter VIII of the report, said that the draft articles on unilateral acts of States provided a sound basis for further discussion. His delegation agreed with the Commission, however, that as the item was still relatively new, it would be a good idea to gather evidence of State practice in that area.

39. With regard to draft article 2, there was probably room for improvement in the definition of unilateral acts of States. The circumstances under which a unilateral act created legal rights and obligations must be clarified. State practice could help to distinguish between acts intended to produce legal effects and those formulated for political purposes only.

40. The draft articles should also address the relationship between unilateral acts and customary international law and treaty obligations. Article 7, paragraph 6, which concerned the relationship between unilateral acts and peremptory norms of international law, should be expanded in order to clarify possible conflicts between unilateral acts and customary law, treaty obligations and Security Council or General Assembly resolutions. On the other hand, his delegation saw no reason to include in draft article 6 a rule governing situations in which domestic law prohibited State representatives from unilaterally making legally binding commitments on behalf of a State.

41. Turning to chapter X of the report, he said that the introduction of split sessions of the Commission was apparently viewed as helpful by its members. If split sessions increased attendance at meetings of the Commission and enhanced their productivity, his delegation could support them, at least for the following year. His delegation had been informed, however, that a single split session of the Commission resulted in an additional expense of $110,000, an amount equivalent to the annual salary of a legal officer of the Secretariat. The expense could be offset, at least in part, if the length of the Commission's sessions was reduced by one week. That would mean a total of 11 weeks of meetings, rather than 12. In view of the enhanced productivity of split sessions, such a reduction would not necessarily curtail the Commission's output or the quality of its work.

42. The Secretariat should provide detailed information about the financial implications of split sessions of the Commission to the Sixth Committee, which, as the main committee of the General Assembly primarily responsible for the Commission, had as much need to be informed as the Fifth Committee.

43. Close cooperation with States, international organizations and other bodies was undoubtedly necessary, and he assumed that all comments made in the Sixth Committee were duly recorded and transmitted to and taken note of by the Commission.

44. Careful evaluation of States' comments in the Sixth Committee might eliminate the need for extensive detailed questionnaires from the Commission, which could be a strain on resources, and were sometimes forwarded to universities and other academic institutions. Instead of issuing questionnaires, the Commission could increase its direct cooperation with the relevant academic institutions. A close dialogue had already begun with international institutions such as the Committee of Legal Advisers on Public International Law within the Council of Europe.

45. Caution should be exercised in relation to new areas of work, to avoid duplication of the work of other, possibly more specialized, international bodies. In view of the present heavy workload of the Commission, new codification endeavours in the field of environmental law might be better left to the various organs and institutions specialized in environmental problems.

46. **Mr. Baena Soares** (Brazil) said that objective consideration of the subject of unilateral acts of States would ensure that the final product was effective and free from abstractions. The definition provided in paragraph 589 of the Commissions's report as a basis for discussion contained some indispensable elements, and omitted some ideas which had been included in the Special Rapporteur's initial proposal, including the term "unequivocal" to describe the manifestation of the will of a State. The Commission had already accepted that the interpretation of unilateral acts should be one of the points to consider in the short term. The condition of public formulation of the unilateral act had also been omitted, while it was still specified that the act should be made known to the other State or international organization through notification or in some other way.

47. As the Special Rapporteur had explained, the declaration was indeed the basic instrument in the law

governing unilateral acts, and the concept of "reservation" should not be applied in that context.

48. Although the concept of autonomy had been included in the original definition, with a clear purpose, Brazil had no strong objection to its provisional exclusion.

49. It was appropriate to request the Secretariat to prepare a typology of the various forms of unilateral acts which could be identified in the practice of States.

50. Responding promptly to the questionnaire mentioned in paragraph 594 of the report would be an effective means for Governments to cooperate with the Commission and the Special Rapporteur in that area. The questions were well-formulated, and of particular interest was the question related to the capacity to act on behalf of the State to commit it by means of a unilateral act. The question about the rules of interpretation applicable to unilateral acts also required special attention.

51. In relation to the future work of the Special Rapporteur, his delegation endorsed the comments made in paragraph 597 of the Commission's report as appropriate.

52. Turning to chapter IX on international liability for injurious consequences arising out of acts not prohibited by international law, he said his delegation supported the second option proposed by the Special Rapporteur relating to future work in that area, namely deferring consideration of the question of international liability until the Commission had completed the second reading of the draft articles on prevention of transboundary damage from hazardous activities. More rapid progress could be made on the topic if Governments would present their comments in writing as soon as possible.

53. **Mr. Al-Baharna** (Bahrain) referring to the subject of nationality in relation to the succession of States, said that his delegation had no substantive objections to the draft articles on nationality of natural persons in relation to the succession of States, and wished to commend the adoption of a series of draft articles which highlighted principles reflected in a number of human rights instruments.

54. The topic of reservations to treaties was one of the fundamental aspects of international law and a basic element in the contemporary practice of States in relation to the conclusion of multilateral treaties. The draft guidelines on reservations were a great stride forward in the Commission's task in that area.

55. Guideline 1.1.1 on the object of reservations could give rise to doubts about the possibility of making a reservation to a "treaty as a whole". The first two lines of the guideline could be revised to read: "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of certain specific aspects of the treaty as a whole".

56. Guideline 1.3.3 would be clearer if divided into two guidelines: one relating to a treaty prohibiting reservations to all of its provisions, and the other relating to a treaty prohibiting reservations to certain of its provisions. The last three lines could be revised to read: "... except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of certain specific aspects of the treaty as a whole, in their application to its author".

57. Guideline 1.4.3 was unclear, as a number of States had referred to their statements of non-recognition as reservations. If such statements were not reservations, it might be asked how the obligations of the authors of such statements towards the non-recognized entities which were parties to the treaty could be reconciled. Naturally, the State making the statement, whether it was termed a reservation or a statement of non-recognition, would not accept to be bound by any obligation arising from the treaty concerned vis-à-vis the non-recognized entity party to the treaty. The legal effect of the term "statement of non-recognition" on the obligations of States should be explained.

58. In guideline 1.4.1, one might ask what the legal effect of a "unilateral commitment" was, whether a unilateral commitment would be binding on the author of such a statement in the context of the guideline, and whether it would be enforceable against its author even though such a statement purported to impose upon its author obligations which transcended those imposed on it by the treaty. Except for its connection with the obligations arising from the treaty, such a statement of commitment would no doubt resemble a unilateral act.

59. Guideline 1.6. on the scope of definitions would be better placed at the beginning of the set of guidelines, immediately after guideline 1.1.1.

60. All the new terms in the guidelines to which he had just referred might require further explanation, and their legal effects could perhaps be elaborated upon.

61. On the subject of unilateral acts of States, he said it seemed advisable to adopt the more restrictive approach proposed by the Special Rapporteur in his first and second reports. Such acts were the exception to the generally accepted rule that States were bound, internationally, only by the agreements and treaties which they concluded with other States and international organizations.

62. Unilateral acts should be those acts or statements which produced legal effects or gave rise to legal

consequences. The work of the Commission on the topic should be limited to States alone as subjects of international law, thus excluding other subjects of international law such as international organizations. However, such exclusion should not affect the contemporary practice of addressing unilateral acts of States to both States and international organizations, without distinction. Thus, for the purposes of the study of the topic, while unilateral acts of States could be addressed to such organizations, their capacity to formulate them might not be recognized or dealt with. It was also generally agreed that such unilateral acts, the characteristics and effects of which were governed by the law of treaties, were to be excluded from the ambit of the topic. Similarly, unilateral acts whose normative effect arose from performance or existence of some other act or treaty should also be excluded.

63. Unilateral acts of States were autonomous and completely independent of any treaty regime. Unlike treaties, they did not require notification or acceptance by the States or other subjects of international law to which they were addressed. Accordingly, the study should deal strictly with those autonomous unilateral acts of States which had been formulated with the intention of creating, by themselves, international legal effects or international obligations for such States.

64. On the issue of the relationship between the unilateral acts of States and the subject of State responsibility, he said his delegation also shared the view that, in line with the principal objective of the study, which was to provide a strictly limited definition of what was meant by unilateral acts of States, unilateral acts giving rise to international responsibility should be excluded from the study. That approach would also help the Commission to avoid any possible duplication or repetition of the subject of State responsibility, which was being considered as a separate topic. The latter topic clearly dealt with international wrongful acts of States that gave rise to international responsibility. On the other hand, the topic of unilateral acts of States was essentially concerned with a different regime, that of autonomous unilateral acts that were being formulated by States with the intention of creating obligations for those States. Naturally, such obligations were not based on treaty obligations, as in the case of State responsibility.

65. The word "legal" was not needed to qualify the expression "unilateral act" as the definition clearly referred to unilateral acts that created "international legal effects", and not merely statements of a political nature.

66. The expression "unequivocal" used to qualify the unilateral act was considered by the Working Group as unduly restricting the scope of the topic. However, that qualification was significant, as it was difficult to imagine the formulation of a unilateral act that was unclear or contained implied conditions or restrictions. There could be no binding force for such equivocal or qualified statements against their authors, especially where the latter could revoke them on the ground that the implied conditions or restrictions attached to the unilateral acts had not been met or acted upon by the States to which the unilateral acts were addressed.

67. The omission in the Commission's report of the expression "formulated publicly" used in the Special Rapporteur's definition and the replacement of that expression by the words "notified or otherwise made known" were justified on the ground that not all unilateral acts required the use of the mass media to make the act widely known to the international community.

68. Similarly, he agreed that the phrase "the international community as a whole" should be excluded from the definition. It was questionable that the international community as a whole could possibly be the addressee of a unilateral act.

69. The phrase "with the intention of acquiring international legal obligations" was also questioned in the report on the ground that unilateral acts could also "purport to acquire or maintain rights". The alternative proposed wording, "intends to produce legal effects", was not clear enough. The phrase contained in the Special Rapporteur's definition was more definite, as the intention of the State author of the act was quite clear. However, the phrase could be reformulated to read "with the intention of acquiring legal obligations or maintaining rights".

70. Finally, the word "autonomy" should be left without brackets, as a necessary element of the definition. He shared the view of other members of the Commission that the inclusion of that element in the definition was needed in order to "exclude unilateral acts which were subject to treaty regimes".

71. With regard to chapter IX, he noted that the Commission had decided to suspend work on the question of liability until the draft articles on the regime of prevention had been completed. The Sixth Committee had endorsed that decision, agreeing that attention should be focused on prevention. A number of delegations, however, including his own, had emphasized the need to continue work on the topic of liability as well, the principles governing prevention could not be isolated from those governing liability. Moreover, the topic of prevention would be incomplete without the

development of a law governing liability arising from the consequences of harm or non-compliance in general. The Commission should therefore endeavour to find a generally accepted definition of the scope of a regime of liability for activities not prohibited by international law. Difficult though it might be to put in place such a regime, the topic should not be rejected. Indeed, it was both essential and complementary to the treatment of the regime of prevention. Furthermore, it was clear from the Special Rapporteur's report that positive steps were being taken by the international community to evolve and formulate rules in relation to liability.

72. **Mr. Bogaychev** (Russian Federation), speaking on chapter IX, said that the obligation of prevention of transboundary damage was an obligation of conduct not of result. Its violation therefore entailed international responsibility for the State concerned, regardless of the existence of damage. If there was damage, not only State responsibility was involved but also operator liability. The obligation of prevention naturally entailed due diligence, but he noted that such due diligence could not be identical for all countries: standards that were normal for developed countries might be unattainable for countries in economic difficulties. His delegation therefore endorsed the use of compliance procedures of the consultative approach and incentives to comply, with the use of sanctions as a last resort. It was important to maintain a balance of interests between the acting State — in whose territory the hazardous activity took place — and the affected State. His delegation considered that the draft articles followed the correct approach and were in keeping with contemporary international law.

73. Discussions within the Commission and the Committee showed that progress on establishing a universal set of rules on liability for transboundary damage on objective grounds was virtually out of the question. His delegation, therefore, although fully persuaded of the close links between a regime of prevention and a regime of liability, agreed with the majority of the Commission — and, it seemed, of the Committee — that work on the topic of international liability should be suspended until the regime of prevention was finalized in its second reading.

74. The question of the settlement of disputes relating to the interpretation and implementation of the draft articles should be addressed at a later stage, when the final form of the draft articles became clear. Meanwhile, his delegation favoured the inclusion of "soft" procedures, such as consultation, negotiation, investigation and conciliation. It was also agreeable to the inclusion of provisions similar to those contained in the Convention on the Law of the Non-navigational Uses of International Watercourses.

75. **Mr. Mowlaei** (Bangladesh) expressed his appreciation of the suggestion that during the meetings of the Sixth Committee on the report of the International Law Commission delegations should be enabled to enter into dialogue with special rapporteurs on their topic. Such an arrangement would be particularly valuable for small delegations, such as his own.

76. With regard to chapter IV, his delegation particularly welcomed the fact that the structure of the draft articles on nationality in relation to the succession of States incorporated the right of option as an indispensable element, to some extent mitigating the difficulties posed by the notion of habitual residence, which, if applied automatically, could hit whole groups of people with the force of a diktat. His delegation was flexible on the final form that the draft articles should take. The proposal for the text to be a declaration of the General Assembly had the merit of achieving a speedy conclusion.

77. With regard to chapter V, he said that the topic of State responsibility was as fundamentally important as it was difficult and, although great progress had been achieved, much remained uncertain. His delegation could not address the points on which the Commission had sought views until the structure of the draft articles emerged more clearly. As for the questions posed in paragraph 29 of the Commission's report, his delegation offered some tentative answers which it would be happy to reconsider in the light of subsequent analysis by the Special Rapporteur and the Commission. With regard to paragraph 29 (a), the proposed distinction could be drawn if the legal consequences for the injuring State were shown to be different vis-à-vis the injured State from those vis-à-vis other States with only a legal interest in the performance of the obligations. His delegation endorsed paragraph 29 (b), and also (c), for the reasons given by the Special Rapporteur. On paragraph 29 (d), his delegation favoured excluding questions raised by the existence of a plurality of States until a self-contained set of articles based on the normal paradigm had been worked out. In brief, his delegation generally supported the Special Rapporteur's approach.

78. With regard to chapter IX, his delegation noted that the consideration of prevention had been separated from that of liability merely for the sake of convenience. The elaboration of a liability regime was at the core of the Commission's mandate and his delegation endorsed the approach outlined by the representative of New Zealand.

79. Mr. Pulido (Italy), speaking on chapter VIII, expressed his delegation's satisfaction with the general definition of unilateral statements by a State, contained in paragraph 589 of the report, although it would have preferred the inclusion of a specific reference to the autonomous nature of the statement in order to make it clear that the scope of the topic was restricted to acts whose effectiveness in law was not conditioned on the manifestation of any other will besides that of the issuing State. However, while in the current phase of the Commission's work the topic could be limited to acts which were also unilateral declarations, the Commission should not be deterred from considering at a later stage other less formal expressions of the will of the State.

80. His delegation agreed with the suggestion that the Secretariat should prepare a typology of the various kinds of unilateral acts to be found in State practice. The information provided by States in response to the recently issued questionnaire would be most useful. Perhaps the questionnaire could also raise other issues, such as the relationship between unilateral acts and customary international law and the validity of those acts when contrary to General Assembly or Security Council resolutions. On the more general question of the extent to which the rules of the 1969 Vienna Convention on the Law of Treaties could be adapted to unilateral acts, the Convention contained helpful guidelines, but the type of act involved and the specific question at stake should be carefully examined to verify, in each case, the applicability of the solutions it contained.

81. With regard to chapter III, he said that the work on the inherently difficult topic of international liability was at a crucial stage. His delegation agreed with the Commission's decision to defer consideration of the question of international liability pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities. Once that was done, however, the work on international liability should resume promptly. State practice in that sphere was fairly developed in various specific sectors, which should make it possible for the Commission to devise a global regime. To develop international legislation on prevention and not on liability would leave the project incomplete.

82. He welcomed the closer dialogue between the Commission and the Committee. The presence of several special rapporteurs had also proved helpful. A positive development was the frequent requests for written comments and responses to questionnaires by Governments. The highest possible number of Governments should provide such comments, in order to make available a wide spectrum of opinions. He also underlined the importance of the prompt publication and distribution of the Commission's report, thus giving delegations sufficient time to make considered contributions to the debate on the report. The Commission's consultations with scientific institutions, individual experts and national or international organizations were also most significant. Such contacts served the important purpose of raising awareness of the Commission's work and intensifying the exchange of ideas.

83. His delegation welcomed the Commission's conclusion that a flexible, needs-based position on the duration and nature of its sessions should be maintained. He looked forward to an assessment of the outcome of the split session to be held in Geneva in 2006.

84. With regard to the long-term programme of work, while all the possible topics were of substantive interest, two — responsibility of international organizations and the effect of armed conflicts on treaties — were particularly appropriate for inclusion.

85. Ms. Al-Nasser (Kuwait) said that chapter IV concerning nationality in the event of the succession of States was of great importance in resolving problems connected with the nationality, identity and legal status of natural persons. She commended the work and recommendations of the Commission on that issue.

86. With reference to State responsibility, which was covered by chapter V, her delegation, having heard the views expressed, wanted State responsibility in respect of international obligations, as well as breaches thereof and the case of conflicting international obligations, to be resolved by reference to the Vienna Convention on the Law of Treaties of 1969.

87. On the subject of reservations to treaties, dealt with in chapter VI of the report, her delegation considered that, because of the frequency with which States availed themselves of the right to formulate reservations, a right specified in the Vienna Convention on the Law of Treaties of 1969, it had become necessary to develop a new draft text to define practice in that respect. The Commission should address the issue in a flexible manner but without introducing any amendment to the Vienna Convention on the Law of Treaties. Her delegation was in favour of establishing a guide to practice in respect of reservations. In that connection, it was necessary to draw a distinction between a reservation, an interpretative declaration and a unilateral statement relating to the text of conventions because of their differing legal effects in international practice. Her delegation was therefore in favour of the draft guidelines that had been adopted at the fifty-first session of the Commission and endorsed the comments that had been made on it.

88. In connection with chapter VII of the report concerning jurisdictional immunities of States and their property, her delegation agreed with the suggestions of the working group contained in the report relating to the five main issues listed in paragraph 7 of the annex to the report and which had been a subject of disagreement between States. In that connection, her delegation affirmed the necessity of respecting the principle of State sovereignty and said that, because of differences between the internal legal systems of States, it was necessary to reach a unified formulation of those issues.

89. Turning to the subject of international liability for injurious consequences arising out of acts not prohibited by international law, which was the subject of chapter IX of the report, her delegation agreed that the Committee should postpone its consideration of that issue until the Commission had finalized its second reading of the draft articles on prevention of transboundary damage from hazardous activities.

90. Mr. Mendonça e Moura (Portugal), speaking on chapter VI, said that his delegation attached the utmost importance to the question of reservations to treaties. The 18 draft guidelines constituting the first chapter of the Guide to practice already gave an impressive idea of the importance and usefulness of the Commission's task. The next step was to deal with another aspect of the subject requiring urgent clarification: the effects of inadmissible reservations. Indeed, it was often unclear which reservations were acceptable and what effect objections had on reservations to treaties. The result was often that each State became the sole judge, in practical terms, of the compatibility of reservations with the object and purpose of the treaty, since there were no specific consequences attached to the formulation of objections by other parties, however numerous they were. Despite the fact that the increasing number of objections to reservations formed contrary to the purpose or integrity of treaties had had a positive result in preventing or reducing the number of reservations of that nature, the problem remained. The Commission should address that task with urgency. Other issues to consider were modifications to reservations, and the denunciation of a treaty, followed by accession with reservations. Such questions had serious implications for the codification of international law.

91. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation welcomed the focus on the regime of prevention but also believed in the principle of compensation when transboundary harm occurred. It had therefore supported draft articles 4 and 5 on prevention and liability, respectively. The duty to pay compensation, which would require the elaboration and acceptance of an appropriate legal principle, should be honoured whether the harm occurred as the result of a breach of a due diligence duty, or despite the implementation of preventive measures, in the latter case, the type of liability and compensation must be determined. He expressed disappointment at the deletion of draft article 1 (b) on activities that did not entail risks under ordinary circumstances but could cause harm in specific instances. Consistent with the Commission's original approach, his delegation supported integral treatment of the whole range of issues relating to international liability for injurious consequences, including, *inter alia*, the question of effective liability. Thus, his delegation strongly favoured the first option offered by the Special Rapporteur with respect to the future course of action on the question of liability. Since the draft articles on prevention were acceptable to the majority of delegations, there was no reason to delay the treatment of other aspects of the topic, let alone to terminate the Commission's work.

92. His delegation urged Governments to respond to the questionnaires circulated by the Commission, which, together with the answers, could be included in the Commission's home page on the Internet. He also stressed the importance of contacts with other bodies, such as the treaty monitoring bodies, particularly in the area of human rights, in order to exchange information on various matters, including reservations.

93. Ms. Alvarez-Núñez (Cuba) said that the Commission's work on State responsibility should culminate in the conclusion of an international convention. Her delegation believed that any amendments to the draft articles elaborated in 1996 should be carefully considered, since they were the product of several decades of erudite work. In that connection, she said that, regardless of the terminology used in article 19, a special regime of State responsibility for serious breaches of an international obligation was indispensable, since they constituted a violation of international law. Her delegation agreed in principle that the grounds for precluding State responsibility should be limited to the extent possible and clearly defined. Draft article 33, however, should be retained in its current form. Precluding State responsibility on the grounds of a state of necessity must never be invoked as a pretext for the breach of *jus cogens* norms, for example, the provisions of the Charter of the United Nations on the use of force. She feared that draft article 34 on self-defence could lead to a misinterpretation of that principle as set forth in the Charter of the United Nations.

94. Her delegation had repeatedly expressed concern at and rejected the concept of countermeasures. Legitimizing

acts of reprisal for a wrongful act merely aggravated differences between States. Furthermore, in many cases small and developing countries would be unable to apply countermeasures against developed countries. The peaceful settlement of disputes should be linked to countermeasures only in the most general terms.

91. Concerning reservations to treaties, she said that calling into question the regime of reservations set out in the 1969 and 1986 Vienna Conventions on the Law of Treaties, far from promoting universality, would limit the participation of States in multilateral instruments. An integral approach must be taken to examining reservations to treaties; in that respect, reservations to human rights treaties were no different from reservations to other types of treaties. In determining the admissibility and effects of reservations, the treaty bodies, which had been established exclusively to monitor implementation, could not take the place of the States parties themselves.

92. Referring to international liability for injurious consequences arising out of acts not prohibited by international law, she said that States should take responsibility for injurious consequences that occurred within their territory, notwithstanding the civil liability incurred for any damage resulting from such acts. Her delegation agreed that it was also the State's responsibility to ensure that operators under its jurisdiction were taking preventive measures, and to assume subsidiary liability if they were not.

93. Nationality in relation to the succession of States dealt with a fundamental human right and entailed, as a corollary, the prevention of statelessness. Her delegation supported the Commission's recommendation to adopt the draft articles as a General Assembly declaration (A/56/10, para. 44). The norms they embodied were sufficiently flexible and would help States both to deal with the problems of nationality arising from the succession of States and to enact domestic legislation. She noted, however, that the draft articles departed from certain international practices with regard to the topic.

94. Her delegation supported the elaboration of a convention on the jurisdictional immunities of States and their property that would be acceptable to all States and would take into account the commercial practices of the developing countries. The report of the Working Group on Jurisdictional Immunities of States and their Property formed a sound basis for future deliberations. The Commission's work on unilateral acts of States would facilitate the development of friendly relations and cooperation among States in an age of globalization. For obvious reasons, her delegation attached great importance to the topic and would submit its views to the Commission in writing.

95. **Mr. Edmond** (Haiti) said that article 1 of the draft articles on the nationality of natural persons in relation to the succession of States was firmly based on the Universal Declaration of Human Rights and oth. human rights instruments affirming the right of every individual to a nationality. The chief concern was to avoid having individuals left stateless under all the varied forms that succession might take. The articles reflected the principle of respect for the will of the persons concerned, while achieving a balance between the interests of the State and those of individuals. His delegation supported the adoption of the draft preamble and articles by the General Assembly in the form of a declaration, which would contribute towards harmonizing national laws on the subject. In view of the lack of interest on the part of States in the questions of the nationality of legal persons, the Commission's decision not to proceed with the topic was justified.

96. The draft articles on jurisdictional immunities of States and their property formed a sound basis for future deliberations. His delegation shared the opinion of the Algerian delegation that to reduce the State to the status of a private individual by according it the same treatment before a foreign jurisdiction undermined the principle of sovereignty, which was fundamental to international law. Notwithstanding, it was reasonable to apply measures of constraint to any property of the State used for economic and commercial activities; however, the notion of commercial transactions had to be defined very carefully, taking into account the purpose of an activity.

97. In the highly important work on State responsibility, his delegation was confident that the Special Rapporteur would take into account the comments of States on the articles provisionally adopted on first reading on the origin of international responsibility.

98. **Mr. Zellweger** (Observer for Switzerland), referring to reservations to treaties, said that the inclusion of examples of unilateral statements in draft guideline 1.1.1 would elucidate the concepts of across-the-board reservations and "specific aspects". While draft guideline 1.1.3 on statements purporting to limit the obligations of their author seemed merely to repeat an element of the definition of reservations already contained in draft guideline 1.1, it became more meaningful in the context of draft guideline 1.4.3 on statements purporting to undertake unilateral commitments. The hypothesis contained in draft guideline 1.1.6 on statements purporting to discharge an obligation by equivalent means did not really correspond to a widespread

practice, however, the Commission could address it in the interest of promoting the progressive development of international law.

103. His delegation fully agreed that the silence of draft guideline 1.2 on the moment when an interpretative declaration could be formulated did not imply that it could be formulated at any time and under any circumstances. Perhaps that should be specified in the definition of interpretative declarations.

104. His delegation was of the view that a unilateral statement whereby a State or an international organization subordinated its consent to be bound by a treaty to a specific interpretation of that treaty or certain of its provisions corresponded more closely to a reservation than an interpretative declaration. The purpose of an interpretative declaration, however, was not to produce a legal effect on the meaning and scope of treaty provisions as they applied to all contracting parties. It would be premature for the Commission to decide whether to view conditional interpretative declarations as reservations or draw a distinction between the two. A conclusive answer was likely to emerge from the Commission's consideration of the legal regime applicable to reservations and interpretative declarations. Draft guideline 1.3 on the distinction between reservations and interpretative declarations and draft guideline 1.3.2 on phrasing and names were inextricably linked and should be merged or, at least, appear in sequence, even if that meant placing draft guideline 1.3.1 on the method of implementation of the distinction between reservations and interpretative declarations after all the draft guidelines on legal effect.

105. There appeared to be a contradiction between paragraph (2) and paragraph (4) of the commentary on draft guideline 1.3.3 on formulation of a unilateral statement when a reservation is prohibited. On the one hand, the Commission automatically viewed statements made when reservations were prohibited as interpretative declarations and, on the other hand, maintained that it was not the guideline's purpose to determine what those statements constituted. Paragraph (4) seemed to be more in line with the Commission's real intentions and also reflected his delegation's interpretation of the draft guideline. However, the inclusion of a refutable assumption was questionable; perhaps the draft guideline should simply indicate that, where reservations to certain of a treaty's provisions were prohibited, that prohibition did not extend to unilateral declarations which neither excluded nor modified the legal effect of those provisions.

106. Since the Guide to practice was meant as a tool to assist States, it should not have the kind of legal scope implied by the phrase "outside the scope of the present Guide to practice". That phrase, which appeared in all six draft guidelines under section 1.4 on unilateral statements other than reservations and interpretative declarations, should be deleted.

107. **Mr. Mikulka** (Secretary of the Committee), responding to a question raised by the representative of Germany at a previous meeting, said that the additional expense of a split session of the Commission in 2000 would be a total of $107,230 ($90,000 for airfare for the members of the Commission, $8,000 for airfare for the secretariat and $7,230 for additional daily subsistence allowance payments for the secretariat). Shortening the session by one week would save $99,087 in daily subsistence allowance payments for the Commission members and secretariat.

108. **Ms. Fernández de Gurmendi** (Argentina) asked for a comparison of the costs of holding the session in Geneva and in New York.

109. **Mr. Mikulka** (Secretary of the Committee) said that if all or part of the session were held in New York the additional cost would be even higher.

110. **Mr. Díaz Paniagua** (Costa Rica) said that as a matter of principle his delegation believed that discussion of financial matters should be left to the Fifth Committee.

111. **Mr. Shannon-Hall** (Ghana) said that the Committee had a duty to discuss matters with budget implications before making decisions concerning bodies under its purview.

112. **Ms. Wilson** (United States of America) said that the Committee should not make decisions without being fully informed. She would like to know the estimated savings to be achieved from devoting one week at the beginning or end of the Commission session to meetings requiring limited attendance, as suggested in the report.

113. **Mr. Mikulka** (Secretary of the Committee) said that, while the figures were somewhat speculative, he estimated that about $ 8,000 could be saved in daily subsistence allowance payments during a week of limited rather than full attendance.

114. **Mr. Gomaa** (Egypt) and **Ms. Alvarez Núñez** (Cuba) said that, at that level of financial detail, the discussion properly belonged in the Fifth Committee.

115. **Mr. Rodríguez Cedeño** (Special Rapporteur of the International Law Commission for unilateral acts) said that he concurred with the views expressed by many delegations that better, more direct communication between the Sixth

Committee and the Commission's special rapporteurs was indispensable. It was to be hoped that more informal meetings could be arranged in parallel to the sessions of the two bodies. The debate he had heard on unilateral acts, the issue for which he was responsible, had been very complete and would be helpful to him in the preparation of his third report and to the Commission at its next session. He had particularly noted States' views on the elements of the definition of unilateral acts, on the suspension, modification and revocation of unilateral acts, and on the suitability of the 1969 Vienna Convention on the Law of Treaties as a frame of reference. Unilateral acts had special characteristics that distinguished them from conventional acts and made a mutatis mutandis application of the law of treaties inadvisable. Above all, he had noted the emphasis on the need for more research into State practice. In that regard, Governments' response to the draft questionnaire on State practice prepared at the request of the Commission's Working Group on Unilateral Acts of States would be invaluable.

110. **Mr. Gaditsi** (Chairman of the International Law Commission) said that without substantial input by Governments the work of the Commission would not be effective or useful. The Commission, as a body of experts, relied on existing case law, State practice and other sources of international law. But projecting law for the future required the consideration of political reality, and that was what States should bring to the work of the Commission. He therefore urged Governments to reply as quickly as possible to requests for information from the Commission. The comments made in the Committee would also be summarized by the secretariat and considered carefully by the special rapporteurs and the Commission at its next session. The observations of the legal adviser of the United Kingdom on the interaction between the Committee and the Commission had raised points worth further consideration.

111. The Committee's comments had shown that the work of the Commission at its past session had been well received. The credit went not only to the members of the Commission, but also to the Governments that had devoted time to answering questionnaires and to the Committee secretariat, which, among other things, had enabled the results of the session to be disseminated immediately on the Internet.

112. Many delegations had commented on how rapidly the Commission had completed its work and the importance of keeping up the momentum. The Commission would do everything in its power to satisfy all hopes, but the Committee should be aware that the following year's agenda was particularly heavy, including reports by special rapporteurs on nearly every topic. Moreover, the Commission wished to seize the opportunity to complete the work on State responsibility in the current quinquennium, perhaps in the year 2000, and that would mean a longer session and concentration on that topic. He hoped for the continued support of the Committee in that regard.

The meeting rose at 1.10 p.m.